TEXAS REGISTER

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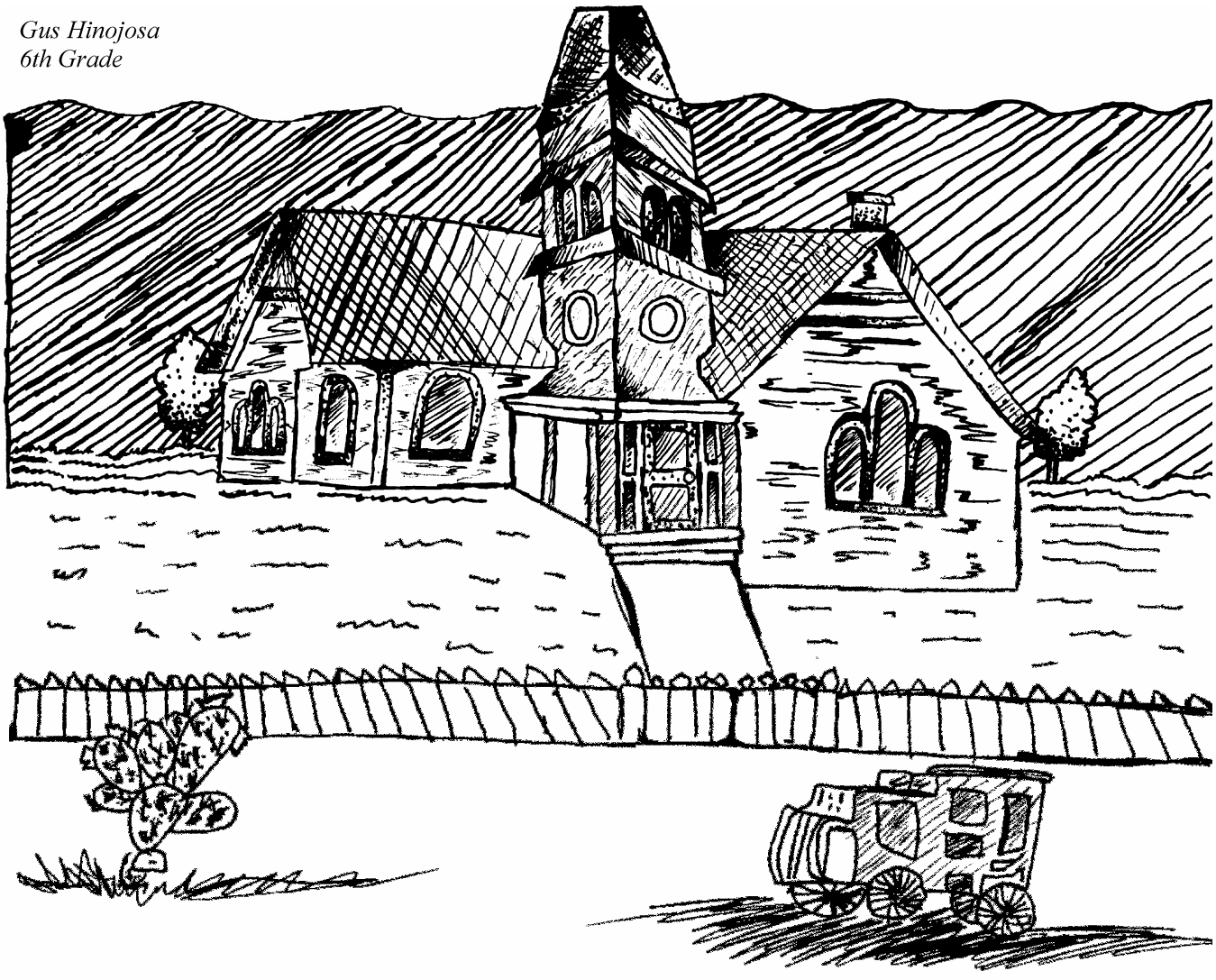
Gus Hinojosa
6th Grade



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

TABLES AND GRAPHICS

IN ADDITION

Department of Assistive and Rehabilitative Services

Texas Cancer Council

Coastal Coordination Council

Comptroller of Public Accounts

Office of Consumer Credit Commissioner

Texas Commission on Environmental Quality

Texas Ethics Commission

State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments

Texas Health and Human Services Commission

Texas Department of Housing and Community Affairs

Texas Department of Insurance

Texas Lottery Commission

Texas State Board of Pharmacy

Public Utility Commission of Texas

School Land Board

Texas Department of Transportation

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinion

RQ-0612-GA

Requestor:

The Honorable William J. Stroman, Jr.

Sterling County Attorney

Post Office Box 88

Sterling City, Texas 76951

Re: Authority of a commissioners court to grant a tax abatement to a wind generating firm for construction of wind turbines located on real property owned by a county commissioner (RQ-0612-GA)

Briefs requested by September 10, 2007

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200703613
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: August 14, 2007

♦ ♦ ♦

Opinions

Opinion No. GA-0561

Honorable R. Lowell Thompson

Navarro County Criminal District Attorney

Navarro County Courthouse

300 West Third Avenue, Suite 203

Corsicana, Texas 75110

Re: Authority of the Texas Alcoholic Beverage Commission or the City of Corsicana to regulate a business establishment that permits the possession and consumption of alcoholic beverages on a "BYOB" basis (RQ-0568-GA)

S U M M A R Y

Under the terms of the Texas Alcoholic Beverage Code, a pool hall may operate on a BYOB ("bring your own bottle") basis without a permit or license from the Texas Alcoholic Beverage Commission. Moreover, the City of Corsicana may not by municipal ordinance regulate the possession or consumption of alcoholic beverages within a pool hall that operates on a BYOB basis.

Opinion No. GA-0562

The Honorable Cindy Stormer

235th Judicial District Attorney

Cooke County Courthouse

Gainesville, Texas 76240

Re: Whether a district attorney may accept donations of funds (RQ-0571-GA)

S U M M A R Y

District attorneys generally are not authorized to accept funds donated to compensate their employees. A commissioners court is authorized to accept such donations, and a commissioners court's acceptance of such donations is necessary before the funds may be used to compensate a district attorney's employees.

A commissioners court that accepts funds donated on condition that the funds be used to compensate the district attorney's employees, but fails to use the funds for that purpose, risks revocation of the donation.

Opinion No. GA-0563

Mr. James A. Cox, Jr., Chair

Texas Lottery Commission

Post Office Box 16630

Austin, Texas 78761-6630

Re: Eligibility for a manufacturer's or distributor's license under the Bingo Enabling Act, chapter 2001 of the Occupations Code (RQ-0573-GA)

S U M M A R Y

Under the Bingo Enabling Act, chapter 2001 of the Occupations Code, an applicant required to list in its application an individual who holds ten percent or more of an equitable or credit interest in a holding company that, in turn, holds an equitable or credit interest in another subsidiary manufacturer or distributor company, is not ineligible as a matter of law for a distributor's or manufacturer's license. Because the holding company and its subsidiary are treated as separate and distinct legal entities under Texas law, the individual does not hold, as a matter of law, an equitable or credit interest in the subsidiary bingo manufacturer or distributor by virtue of his or her equitable or credit interest in the holding company.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200703621
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: August 15, 2007

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 22. EXAMINING BOARDS

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 533. PRACTICE AND PROCEDURE

22 TAC §§533.1 - 533.8, 533.20, 533.30 - 533.37, 533.40

The Texas Real Estate Commission (TREC) adopts on an emergency basis new rules to Chapter 533 concerning Practice and Procedure. The new rules are as follows: §533.1 concerning definitions of terms found in the chapter; §533.2 concerning the purpose and scope of the chapter; §533.3 concerning filling and notice procedures in a contested case; §533.4 concerning failure to answer, failure to attend a hearing and default; §533.5 concerning the adjudicative hearing record; §533.36 concerning filing of exceptions and replies; §533.7 concerning proposals for decisions; §533.8 concerning final orders, motions for rehearing, and emergency orders; §533.20 concerning informal proceedings; §533.30 concerning alternative dispute resolution (ADR) policy; §533.31 concerning referral of contested matters for alternative dispute resolution procedures; §533.32 concerning appointment of a mediator; §533.33 concerning qualifications of mediators; §533.34 concerning commencement of alternative dispute resolution; §533.35 concerning stipulations; §533.36 concerning agreements; §533.37 concerning confidentiality and §533.40 concerning negotiated rulemaking.

The new rules are adopted on an emergency basis to comply with new legislation that transfers the functions of TREC's administrative law judge to the State Office of Administrative Hearings and provides for a negotiated rulemaking process. The legislation included revisions to Texas Occupations Code Chapters 1101 and 1102 enacted during the 80th Legislative Session, Regular Session, by Senate Bill 914 and House Bill 1530. The effective date of SB 914 and HB 1530 is September 1, 2007. The adoption of the new rules permits TREC to comply with the effective date required by both bills.

The emergency rules are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statutes affected by this emergency adoption are Texas Occupations Code, Chapters 1101 and 1102, and Senate Bill 914, and House Bill 1530, 80th Legislature, R.S. No other statute, code or article is affected by the adopted amendments.

§533.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) ADR--Alternative dispute resolution

(2) ADR Administrator--The trained coordinator in the commission office designated by the commission to coordinate and oversee the ADR procedures which may include conducting mediations. The ADR Administrator shall serve as a resource for ADR training and shall collect data concerning the effectiveness of the ADR procedures.

(3) Administrator--The Administrator of the Texas Real Estate Commission.

(4) ALJ--Administrative law judge employed by the State Office of Administrative Hearings.

(5) Alternative Dispute Resolution (ADR) Procedures--Alternatives to judicial forums or administrative agency contested case proceedings for the voluntary settlement of contested matters through the facilitation of an impartial third-party.

(6) APA--The Administrative Procedure Act (Tex. Gov't. Code, Chapter 2001).

(7) Applicant--Any person seeking a license, certificate, registration, approval or permit from the commission

(8) Commission--Texas Real Estate Commission

(9) Complainant--Any person who has filed a complaint with the commission against any person whose activities are subject to the jurisdiction of the commission.

(10) Contested case or proceeding--A proceeding in which the legal rights, duties, or privileges of a party are to be determined by the commission and/or administrator after an opportunity for adjudicative hearing.

(11) Final decision maker--The commission and/or the administrator, both of whom are authorized to render the final decision in a contested case.

(12) Judge--Administrative law judge employed by the State Office of Administrative Hearings.

(13) License--The whole or part of any commission registration, license, certificate, approval, permit, or similar form of permission required or permitted by law.

(14) Mediator--The commission employee or other state employee who presides over ADR proceedings regardless of which ADR method is utilized.

(15) Party--A person admitted to participate in a case before the final decision maker.

(16) Person--Any individual, partnership, corporation, or other legal entity, including a state agency or governmental subdivision.

(17) Pleading--A written document submitted by a party, or a person seeking to participate in a case as a party, which requests procedural or substantive relief, makes claims, alleges facts, makes legal argument, or otherwise addresses matters involved in the case.

(18) Private Mediator--A person in the mediation profession who is not a Texas State employee and who has met all the qualifications prescribed by Texas law for mediators.

(19) Respondent--Any person, licensed or unlicensed, who has been charged with violating a law establishing a regulatory program administered by the commission or a rule or order issued by the commission.

(20) Rule--Any commission statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the commission and is filed with the *Texas Register*.

(21) SOAH--State Office of Administrative Hearings.

§533.2. Purpose and Scope.

(a) Purpose. Unless otherwise provided by statute or by the provisions of this subchapter, this subchapter will govern the institution and final conclusion of proceedings followed in handling all adjudicative matters under the APA. Once the commission files the Request to Docket Case form with SOAH, SOAH acquires jurisdiction over a contested case, and a hearing conducted by SOAH on a contested case proceeding pending before the commission is governed by SOAH's rules of procedure. In the case of a conflict with rules in this subchapter, SOAH's rules, 1 TAC Chapter 155, control after the filing of the Request to Docket Case form and until after final amendments or corrections to the proposal for decision.

(b) Scope. These rules govern the institution, conduct, and determination of adjudicative proceedings required or permitted by law, whether instituted by the commission or by the filing of an application, claim, complaint, or any other pleading. These rules shall not be construed so as to enlarge, diminish, modify, or otherwise alter the jurisdiction, powers, or authority of the commission, the administrator, or the substantive rights of any person or agency.

§533.3. Filing and Notice.

(a) The commission shall provide notice to all parties in accordance with the APA §2001.052, Chapters 1101 and 1102, Texas Occupations Code, and the following:

(1) If, after investigation of a possible violation and the facts surrounding that possible violation, the commission determines that a violation has occurred, the commission shall issue a written Notice of Alleged Violation.

(2) The Notice of Alleged Violation shall include:

(A) a brief summary of the alleged violation(s);

(B) a statement of the amount of the penalty and/or sanction recommended; and

(C) a statement of the right of the Respondent to a hearing.

(3) The commission shall base the recommendation on the factors set forth in Chapter 533.

(b) Not later than the 20th day after the date on which the notice is received, the Respondent may accept the determination of the commission, including the recommended penalty and/or sanction, or make a written request for a hearing on that determination.

(c) Upon receipt of a written request for hearing, the commission shall submit a Request for Docket Case form to SOAH accompanied by legible copies of all pertinent documents, including but not limited to the Notice of Hearing or other document describing the agency action giving rise to a contested case. In accordance with 1 TAC §155.9, the commission shall request one or more of the following actions on the Request to Docket Case form:

(1) Setting of hearing;

(2) Assignment of an administrative law judge; and/or

(3) Setting of alternative dispute resolution proceeding, including but not limited to mediated settlement conference, mediation, or arbitration.

(d) The original of all pleadings and other documents requesting action or relief in a contested case, shall be filed with SOAH once it acquires jurisdiction. Pleadings, other documents, and service to SOAH shall be directed to: Docketing Division, State Office of Administrative Hearings, 300 West 15th Street, Room 504, P.O. Box 13025, Austin, Texas 78711-3025. The time and date of filing shall be determined by the file stamp affixed by SOAH. Unless otherwise ordered by the judge, only the original and no additional copies of any pleading or document shall be filed. Unless otherwise provided by law, after a proposal for decision has been issued, originals of documents requesting relief, such as exceptions to the proposal for decision or requests to reopen the hearing, shall be filed with the commission's administrator and/or commission as well as the commission's Enforcement Division, P.O. Box 12188, Austin, Texas 78711; 1101 Camino La Costa, Austin Texas; or by facsimile mail at (512) 465-3962 if the documents contain 20 or fewer pages including exhibits. Filings may be made until 5:00 p.m. on business days. Copies shall be filed with SOAH.

(e) If a real estate salesperson is a respondent, the commission also will notify the salesperson's sponsoring broker of the hearing. If an apprentice inspector or real estate inspector is a respondent, the commission also will notify the sponsoring professional inspector of the hearing.

(f) Any document served upon a party is prima facie evidence of receipt if it is directed to the party's last known complete, correct address as shown by the commission's records. This presumption is rebuttable. Failure to claim properly addressed certified or registered mail will not support a finding of nondelivery.

§533.4. Failure to Answer, Failure to Attend Hearing and Default.

(a) If, within twenty days after receiving a Notice of Alleged Violation, the Respondent fails to accept the commission's determination and recommended administrative penalty and/or sanction, or fails to make a written request for a hearing on the determination, the commission shall enter a default order against the Respondent, containing findings of fact and conclusions of law.

(b) After receiving a notice proposing disapproval of an application an Applicant may request a hearing in writing within twenty days of receipt of the notice or forfeit the right to a hearing unless otherwise provided by applicable law.

(c) The commission may delegate to the administrator the commission's authority to act under Texas Occupations Code §1101.704(b) and subsection (a) of this section.

(d) 1 TAC §155.55 (SOAH rules) applies where a Respondent fails to appear on the day and time set for administrative hearing. In that case, the commission's staff may move either for dismissal of the case from SOAH's docket or for the issuance of a default proposal for decision by the judge.

§533.5. The Adjudicative Hearing Record.

(a) On the written request by a party to a case or on request of the judge, a written transcript of all or part of the proceedings shall be

prepared. The cost of the transcript is borne by the requesting party. This section does not preclude the parties from agreeing to share the costs associated with the preparation of a transcript. If only the judge requests a transcript, costs will be assessed to the Respondent(s) or Applicant(s), as appropriate.

(b) Any party who needs a certified language interpreter for presentation of its case shall be responsible for requesting the services of an interpreter. The requesting party shall be responsible for making arrangements with a certified language interpreter once a request is made. The cost of the certified language interpreter shall be borne by the party requiring the interpreter's services.

§533.6. Filing of Exceptions and Replies.

(a) Any party of record who is adversely affected by the proposal for decision of the judge shall have the opportunity to file exceptions and a brief to the proposal for decision within 15 days after the date of service of the proposal for decision.

(b) A reply to the exceptions may be filed by the other party within 15 days of the filing of the exceptions.

(c) Exceptions and replies shall be filed with the judge with copies served on the opposing party. The proposal for decision may be amended by the judge pursuant to the exceptions, replies, or briefs submitted by the parties without again being served on the parties.

§533.7. Proposals for Decision.

(a) Proposed decisions shall be brought before the commission for final decision.

(b) The proposal for decision may be acted on by the commission after the expiration of 10 days after the filing of replies to exceptions to the proposal for decision or upon the day following the day exceptions or replies to exceptions are due if no such exceptions or replies are filed.

(c) It is the policy of the commission to change a finding of fact or conclusion of law in a proposal for decision or to vacate or modify the proposed order of a judge when, the commission determines:

(1) that the judge did not properly apply or interpret applicable law, agency rules, written policies provided by staff or prior administrative decisions;

(2) that a prior administrative decision on which the judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

§533.8. Final Orders, Motions for Rehearing, and Emergency Orders.

(a) Unless otherwise authorized under §533.13(f) of this chapter, a final order in a contested case shall be in writing and shall be signed by the presiding officer of the commission. Final orders shall include findings of fact and conclusions of law separately stated.

(b) If the commission modifies, amends, or changes a proposal for decision, the order shall reflect the commissions changes as stated in the record of the meeting and state the specific reason and legal basis for the changes made according to §533.7(c) of this chapter.

(c) A party notified by mail of a final decision or order shall be presumed to have been notified on the third day after the date on which the notice is mailed.

(d) The timely filing of a motion for rehearing is a prerequisite to appeal.

(e) Motions for rehearing are controlled by Texas Government Code §2001.145 and §2001.146.

(f) If the commission and/or the administrator find that an imminent peril to the public health, safety, or welfare requires immediate effect of a final decision or order, that finding shall be recited in the decision or order as well as the fact that the decision or order is final and effective on the date signed, in which event the decision or order is final and appealable on the date signed and no motion for rehearing is required as a prerequisite for appeal.

(g) A petition for judicial review must be filed in a District Court of Travis County Texas within 30 days after the order is final and appealable, as provided by Government Code, Title 10, Subtitle A, Chapter 2001. A party filing a petition for judicial review must also comply with the requirements of Occupations Code, §1101.707.

(h) If, after judicial review, the penalty is reduced or not assessed, the administrator shall remit to the person charged the appropriate amount, plus accrued interest if the penalty has been paid, or shall execute a release of the bond if a supersedeas bond has been posted. The accrued interest on amounts remitted by the administrator under this subsection shall be paid at a rate equal to the rate charged on loans to depository institutions by the New York Federal Reserve Bank, and shall be paid for the period beginning on the date that the assessed penalty is paid to the commission and ending on the date the penalty is remitted.

§533.20. Informal Proceedings.

(a) Informal disposition of any contested case involving a licensee or an applicant for licensure may be made through an informal conference pursuant to Occupations Code §1101.660.

(b) The commission and the respondent or applicant may enter into an agreed order without first engaging in an informal conference under this subchapter.

(c) A licensee or applicant may request an informal conference; however, the decision to hold a conference shall be made by the Director of Enforcement.

(d) An informal conference shall be voluntary and shall not be a prerequisite to a formal hearing.

(e) An informal conference may be conducted in person, or by electronic, telephonic, or written communication.

(f) The Director of Enforcement or the director's designee shall decide upon the time, date and place of the informal conference, and provide written notice to the licensee or applicant. Notice shall be provided by certified mail no less than ten days prior to the date of the conference to the permanent mailing address of the licensee or applicant. The ten days shall begin on the date of mailing. The licensee or applicant may waive the ten-day notice requirement.

(g) A copy of the commission's rules concerning informal conferences shall be enclosed with the notice of the informal conference. The notice shall inform the licensee or applicant of the following:

(1) that the licensee or applicant may be represented by legal counsel;

(2) that the licensee or applicant may offer documentary evidence as may be appropriate;

(3) that at least one public member of the commission shall be present;

(4) that two staff members, including the staff attorney assigned to the case, with experience in the regulatory area that is the subject of the proceedings shall be present;

(5) that the licensee's or applicant's attendance and participation is voluntary; and

(6) that the complainant involved in the alleged violations may be present.

(h) The notice of the informal conference shall be sent to the complainant at his or her last known address. The complainant shall be informed that he or she may appear in person or may submit a written statement for consideration at the informal conference.

(i) The conference shall be informal and need not follow the procedures established in this chapter for contested cases and formal hearings.

(j) The licensee or applicant, the licensee's or applicant's attorney, the commission member, and the staff attorney may question the respondent or complainant, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(k) The staff attorney assigned to the case shall attend each informal conference. The commission member or other staff member may call upon the attorney at any time for assistance in the informal conference.

(l) No formal record of the proceedings of the informal conference shall be made or maintained.

(m) The complainant may be excluded from the informal conference except during the complainant's oral presentation. The licensee or applicant, the licensee's or applicant's attorney, and commission staff may remain for all portions of the informal conference, except for consultation between the commission member and commission staff.

(n) The complainant shall not be considered a party in the informal conference but shall be given the opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.

(o) At the conclusion of the informal conference, the commission member or staff attorney may propose an informal settlement of the contested case. The proposed settlement may include administrative penalties or any disciplinary action authorized by the Act. The commission member or staff attorney may also recommend that no further action be taken.

(p) The licensee or applicant may either accept or reject the settlement recommendations at the conference. If the recommendations are accepted, an agreed order shall be prepared by the staff attorney and forwarded to the licensee or applicant. The order shall contain agreed findings of fact and conclusions of law. The licensee or applicant shall execute the order and return the signed order to the commission within ten days of his or her receipt of the proposed agreed order. If the licensee or applicant fails to return the signed order within the stated time period, the inaction shall constitute rejection of the settlement recommendation.

(q) If the licensee or applicant rejects the proposed settlement, the matter shall be referred to the Director of Enforcement for appropriate action.

(r) If the licensee or applicant signs and accepts the recommendation, the agreed order shall be submitted to the administrator for approval.

(s) If the administrator does not approve a proposed agreed order, the licensee or applicant shall be so informed and the matter shall be referred to the Director of Enforcement for other appropriate action.

(t) A licensee's opportunity for an informal conference under this subchapter shall satisfy the requirement of the APA, §2001.054(c).

(u) The commission may order a license holder to pay a refund to a consumer as provided in an agreement resulting from an informal conference instead of or in addition to imposing an administrative penalty. The amount of a refund ordered as provided in an agreement resulting from an informal conference may not exceed the amount the consumer paid to the license holder for a service regulated by the Act and this title. The commission may not require payment of other damages or estimate harm in a refund order.

§533.30. Alternative Dispute Resolution Policy.

It is the commission's policy to encourage the fair and expeditious resolution of all contested matters through voluntary settlement procedures. The commission is committed to working with all parties to achieve early settlement of contested matters.

§533.31. Referral of Contested Matter for Alternative Dispute Resolution Procedures.

The commission's Director of Enforcement or Human Resources Office, on behalf of the commission, may seek to resolve a contested matter through negotiation or mediation involving all parties and if so, shall refer the matter for mediation in accordance with §60.155.

§533.32. Appointment of Mediator.

(a) For each matter referred for ADR procedures, the ADR Administrator shall mediate or assign another commission mediator unless the parties agree upon the use of another agency's mediator or private mediator. The ADR Administrator may assign a substitute or additional mediator to a proceeding as the ADR Administrator deems necessary.

(b) A private mediator may be hired for commission ADR procedures provided that:

(1) the parties unanimously agree to use a private mediator;

(2) the parties unanimously agree to the selection of the person to serve as the mediator; and

(3) the mediator agrees to be subject to the direction of the commission's ADR Administrator and to all time limits imposed by the Administrator, statute or regulation.

(c) If a private mediator is used, the costs for the services of the mediator shall be apportioned equally among the parties, unless otherwise agreed upon by the parties, and shall be paid directly to the mediator.

(d) All mediators in commission mediation proceedings shall subscribe to the ethical guidelines for mediators adopted by the ADR Section of the State Bar of Texas.

§533.33. Qualifications of Mediators.

(a) A commission mediator will receive at a minimum 40 hours of formal training in ADR procedures through a program approved by the commission's administrator.

(b) SOAH mediators, employees of other agencies who are mediators, and private pro bono mediators, may be assigned to contested matters as needed.

(1) Each mediator shall first have received 40 hours of Texas mediation training as prescribed by Texas law.

(2) Each mediator shall have some expertise in the area of the contested matter.

(3) If the mediator is a SOAH judge, that person will not also sit as the judge for the case if the contested matter goes to public hearing. If the mediator is an employee of the commission and dispute

does not settle, that mediator will not have any further contact or involvement concerning the disputed matter.

§533.34. Commencement of ADR.

(a) The commission encourages resolution of disputes at any time; however, ADR procedures may begin, at the discretion of the Director of Enforcement or the Human Resources Office, anytime after the commission anticipates initiation of an adverse action against an applicant, respondent, or employee. The commission may issue a Notice of Mediation along with a Notice of Alleged Violation or along with a notice of a proposed denial of licensure or opportunity to take an examination. Prior to the submission of a Request for Docket Case form to SOAH, and with agreement of all parties, the ADR Administrator may schedule mediation upon any party's request.

(b) A commission employee, subsequent to appealing a personnel action to the appropriate commission Division Director in accordance with the commission's Personnel Manual and without having obtained satisfaction, may request approval of mediation from the Human Resources Office.

(c) Upon unanimous motion of the parties and at the discretion of the administrative law judge, the provisions of this section may apply to contested case hearings. In such cases, it is within the discretion of the judge to continue the hearing to allow the use of ADR procedures.

§533.35. Stipulations.

When the ADR procedures do not result in the full settlement of a matter, the parties in conjunction with the mediator, may limit the contested issues through the entry of written stipulations. Such stipulations shall be forwarded or formally presented to the administrative law judge assigned to conduct the contested case hearing on the merits and shall be made part of the hearing record.

§533.36. Agreements.

All agreements between or among parties that are reached as a result of ADR must be committed to writing and will have the same force and effect as a written contract.

§533.37. Confidentiality.

(a) Except as provided in subsections (c) and (d) of this section, a communication relating to the subject matter made by a participant in an ADR procedure, whether before or after the institution of formal ADR proceedings, is confidential, is not subject to disclosure, and may not be used as evidence in any further proceeding.

(b) Any notes or record made of an ADR procedure are confidential, and participants, including the mediator, may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an ADR procedure is admissible or discoverable only if it is admissible or discoverable independent of the procedure.

(d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the judge to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure.

(e) All communications in the mediation between parties and between each party and the mediator are confidential. No shared information will be given to the other party unless the party sharing the information explicitly gives the mediator permission to do so. Material provided to the mediator will not be provided to other parties and will not be filed or become part of the contested case record. All notes taken during the mediation conference will be destroyed at the end of the process.

§533.40. Negotiated Rulemaking.

(a) It is the commission's policy to employ negotiated rulemaking procedures when appropriate. When the commission is of the opinion that proposed rules are likely to be complex, or controversial, or to affect disparate groups, negotiated rulemaking will be considered.

(b) When negotiated rulemaking is to be considered, the commission will appoint a convener to assist it in determining whether it is advisable to proceed. The convener shall have the duties described in Chapter 2008, Government Code, and shall make a recommendation to the administrator to proceed or to defer negotiated rulemaking. The recommendation shall be made after the convener, at a minimum, has considered all of the items enumerated in Government Code, §2008.052(c).

(c) Upon the convener's recommendation to proceed, the commission shall initiate negotiated rulemaking according to the provisions of Chapter 2008, Government Code.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Loretta DeHay
Interim Administrator and General Counsel
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For further information, please call: (512) 465-3900

22 TAC §§533.31 - 533.39

(Editor's note: The text of the following sections adopted for repeal on an emergency basis will not be published. The sections may be examined in the offices of the Texas Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Real Estate Commission (TREC) adopts on an emergency basis the repeal of existing provisions in Chapter 533 concerning Practice and Procedure, specifically §§533.31 - 533.39. The repeal is adopted on an emergency basis to comply with new legislation that included revisions to Texas Occupations Code Chapters 1101 and 1102 enacted during the 80th Legislative Session, Regular Session, by Senate Bill 914 and House Bill 1530. The effective date of SB 914 and HB 1530 is September 1, 2007. New rules are being simultaneously adopted on an emergency basis to replace the existing rules. The repeal of the rules are necessary because they conflict with the new rules that address the procedure for taking disciplinary hearings to the State Office of Administrative Hearings as provided by SB 914. The repeal of the existing rules and the adoption of the new rules permit TREC to comply with the effective date required by both bills.

The emergency rules are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish

standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statutes affected by this emergency adoption are Texas Occupations Code, Chapters 1101 and 1102, and Senate Bill 914, and House Bill 1530, 80th Legislature, R.S. No other statute, code or article is affected by the adopted amendments.

§533.31. Procedures for Rulemaking and Contested Cases.

§533.32. Filing of Documents.

§533.33. Computation of Time.

§533.34. Disapproval of an Application for a License or Registration.

§533.35. Revocation or Other Action against a License or Registration.

§533.36. Hearings before Presiding Officer or the Members of the Commission.

§533.37. Limitations on Number of Witnesses.

§533.38. Motions for Rehearing, Modification of Order, or Probation.

§533.39. Judicial Review.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 535. GENERAL PROVISIONS
SUBCHAPTER D. THE COMMISSION

22 TAC §535.42

The Texas Real Estate Commission (TREC) adopts on an emergency basis revisions to §535.42 concerning Jurisdiction and Authority. The amendment is adopted on an emergency basis to comply with new legislation that included revisions to Texas Occupations Code Chapters 1101 and 1102 enacted during the 80th Legislative Session, Regular Session, by Senate Bill 914 and House Bill 1530. The effective date of SB 914 and HB 1530 is September 1, 2007. The adoption of the amendment permits TREC to comply with the effective date required by both bills. The amendment deletes a reference to an employee of TREC conducting contested case hearings as SB 914 provides that the State Office of Administrative Hearings will conduct such hearings.

The emergency amendment to the rule is adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statutes affected by this emergency adoption are Texas Occupations Code, Chapters 1101 and 1102, and Senate Bill 914, and House Bill 1530, 80th Legislature, R.S. No other statute, code or article is affected by the adopted amendments.

§535.42. Jurisdiction and Authority

[~~(a)~~] The commission does not mediate disputes between or among licensees concerning entitlement to sales commissions or recommend individual licensees to the public.

[~~(b) An employee of the commission specifically authorized by it pursuant to Texas Occupations Code, Chapter 1101, (the Act), §1101.151(b)(3), to conduct hearings and render final decisions in contested cases may order issuance of a probationary license under §535.94 of this title (relating to Hearing on Application Disapproval: Probationary Licenses) and may suspend or revoke a license or reprimand or place on probation a licensee for a violation of the Act or a rule of the commission.~~]

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. REQUIREMENTS FOR LICENSURE

22 TAC §535.51

The Texas Real Estate Commission (TREC) adopts on an emergency basis amendments to §535.51, concerning General Requirements and adopts by reference four revised forms.

The amendments are adopted on an emergency basis to comply with new legislation that included revisions to Texas Occupations Code Chapters 1101 and 1102 enacted during the 80th Legislative, Regular Session, by Senate Bill (SB) 914 and House Bill (HB) 1530. The effective date of SB 914 and HB 1530 is September 1, 2007. The amendments, adopted on an emergency basis, permit TREC to comply with the effective date required by both bills. The amendments, adopted on an emergency basis, also adopt by reference revised forms to reflect late renewal penalties for applicants for salesperson and broker license as SB 914 provides for such late penalties.

The amendment is adopted on an emergency basis under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statutes affected by this emergency adoption are Texas Occupations Code, Chapters 1101 and 1102, and Senate Bill 914,

and House Bill 1530, 80th Legislature, Regular Session. No other statute, code or article is affected by the emergency adoption.

§535.51. General Requirements.

(a) - (d) (No change.)

(e) The commission adopts by reference the following forms approved by the commission which are published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188:

(1) Application [~~Effective June 1, 2004, application~~] for a Real Estate Broker License, TREC Form BL-8;

(2) [~~Effective September 1, 2004,~~] Application for a Real Estate Broker License by a Corporation, TREC Form BLC-5;

(3) Effective September 1, 2007, Application [~~Effective September 1, 2004, application~~] for Late Renewal of A Real Estate Broker License, TREC Form BLR-8 [~~7~~];

(4) Effective September 1, 2007, Application for Late Renewal of Real Estate Broker License [~~Privileges~~] by a Corporation, TREC Form BLRC-5 [~~4~~];

(5) (No change.)

(6) Effective September 1, 2007, Application for Late Renewal of Real Estate Salesperson License, TREC Form SLR-9 [~~8~~];

(7) - (9) (No change.)

(10) Effective September 1, 2007, Application for Late Renewal of a Real Estate Broker License by a Limited Liability Company, TREC Form BLRLLC-4 [~~3~~].

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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For further information, please call: (512) 465-3900

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SUBCHAPTER F. EDUCATION, EXPERIENCE, EDUCATIONAL PROGRAMS, TIME PERIODS AND TYPE OF LICENSE

22 TAC §535.61, §535.63

The Texas Real Estate Commission (TREC) adopts on an emergency basis amendments to §535.61, concerning Examinations and §535.63, concerning Education and Experience Requirements for a License.

The amendments are adopted on an emergency basis to comply with new legislation that included revisions to Texas Occupations Code Chapter 1101 enacted during the 80th Legislative, Regular Session, by Senate Bill (SB) 914. The effective date of SB 914 is September 1, 2007. The adoption of the amendment on an emergency basis permits TREC to comply with the effective date required by the bill. The amendments, adopted on an emergency basis, clarify that new Texas Occupations Code §1101.451(f) regarding late renewals does not apply to education and experience waivers authorized by rule under Texas Occupations Code §1101.362.

The amendments are adopted on an emergency basis under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this emergency adoption is Texas Occupations Code, Chapter 1101, and Senate Bill 914, 80th Legislature, Regular Session. No other statute, code or article is affected by the emergency adoption.

§535.61. Examinations.

(a) - (e) (No change.)

(f) Notwithstanding Texas Occupations Code §1101.451(f), the [~~The~~] commission shall waive the examination of an applicant for a broker license who has been licensed as a broker in this state no more than two years prior to the filing of the application. The commission shall waive the examination of an applicant for a salesperson license who has been licensed in this state as a broker or salesperson no more than two years prior to the filing of the application.

(g) (No change.)

§535.63. Education and Experience Requirements for a License.

(a) (No change.)

(b) Education and experience requirements for a broker license.

(1) (No change.)

(2) Notwithstanding Texas Occupations Code §1101.451(f), the [~~The~~] commission may waive education and experience required for a real estate broker license if the applicant satisfies each of the following conditions.

(A) - (C) (No change.)

(3) - (4) (No change.)

(c) Education requirements for a salesperson license.

(1) (No change.)

(2) Notwithstanding Texas Occupations Code §1101.451(f), the [~~The~~] commission may waive the education required for a real estate salesperson license if the applicant satisfies each of the following conditions.

(A) - (B) (No change.)

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER G. MANDATORY CONTINUING EDUCATION

22 TAC §535.71, §535.72

The Texas Real Estate Commission (TREC) adopts on an emergency basis amendments to §535.71, concerning Mandatory Continuing Education: Approval of Providers, Courses and Instructors and adopts by reference one revised form, and §535.72, concerning Mandatory Continuing Education: Presentation of Courses, Advertising and Records.

The amendments are adopted on an emergency basis to comply with new legislation that included revisions to Texas Occupations Code Chapter 1101 enacted during the 80th Legislative, Regular Session, by Senate Bill (SB) 914. The effective date of SB 914 is September 1, 2007. The adoption of the amendment, on an emergency basis, permits TREC to comply with the effective date required by the bill. The amendments, adopted on an emergency basis, provide the procedure by which education providers must ensure compliance with the new statutory requirement which requires that online Mandatory Continuing Education courses may not be completed in less than 24 hours.

The amendments are adopted on an emergency basis under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this emergency adoption is Texas Occupations Code, Chapter 1101, and Senate Bill 914, 80th Legislature, Regular Session. No other statute, code or article is affected by the emergency adoption.

§535.71. Mandatory Continuing Education: Approval of Providers, Courses and Instructors.

(a) - (ee) (No change.)

(ff) For a distance learning course, an online course will not be considered complete until credit is awarded by the provider. The [~~the~~] provider shall award the student credit for the course no earlier than 24 hours after the student starts the course and after the student completes [~~upon completion of~~] the course requirements for credit. The provider [~~and~~] shall report the awarding of credit to the commission[~~. Course credit must be reported~~] either by [~~the provider~~] filing a completed MCE Form 9-8 [~~7~~], Alternative Instructional Methods Reporting Form, signed by the student, or submitting the information contained in MCE form 9-8 [~~7~~] by electronic means acceptable to the commission.

(gg) - (hh) (No change.)

§535.72. Mandatory Continuing Education: Presentation of Courses, Advertising and Records.

(a) (No change.)

(b) Partial credit.

(1) A [~~Effective January 1, 2005, a~~] provider may, but is not required, to permit a student to claim partial credit for a course if:

(A) the course is approved for elective credit only;

(B) the course is not a distance learning course;

(C) the student attends less than the complete number of hours in the course;

(D) the student, by completing MCE Form 14-0, Individual MCE Partial Credit Request Form, requests credit only for the hours the student completed and the student does not claim credit for an hour that the student did not attend in its entirety except as provided by subsection (c) of this section.

(E) the provider signs the MCE Partial Credit Request Form as evidence that the provider has no reason to believe the amount of credit claimed is inaccurate;

(F) the provider submits the MCE Partial Credit Request Form to the commission within the time required to submit the course completion roster under subsection (a) of this section.

(2) (No change.)

(c) (No change.)

(d) Proof of distance learning course completion. In a distance learning course, the provider shall award the student credit for the course no earlier than 24 hours after the student starts the course and after the student completes [~~upon completion of the~~] course requirements for credit. The provider [~~and~~] shall report the awarding of credit to the commission. Course credit must be reported either by the provider filing a completed MCE Form 9-8 [~~7~~], signed by the student, or submitting the information contained in MCE Form 9-8 [~~7~~] by electronic means acceptable to the commission. If the provider chooses to use an electronic reporting process, the process must ensure that only students who complete the course are reported to the commission as receiving course credit and that the process does not compromise the security of commission records.

(e) - (o) (No change.)

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER I. LICENSES

22 TAC §§535.91, 535.92, 535.94

The Texas Real Estate Commission (TREC) adopts on an emergency basis amendments to §535.91, concerning Renewal Notices, §535.92, concerning Renewal: Time for Filing; Satisfaction of Mandatory Continuing Education Requirements, and §535.94, concerning Hearing on Application Disapproval: Probationary Licenses.

The amendments are adopted on an emergency basis to comply with new legislation that included revisions to Texas Occupations Code Chapters 1101 and 1102 enacted during the 80th Legislative, Regular Session, by Senate Bill (SB) 914 and House Bill (HB) 1530. The effective date of SB 914 and HB 1530 is September 1, 2007. The adoption of the amendments, on an emergency basis, to the rules permits TREC to comply with the effective date required by both bills. The amendments, adopted on an emergency basis, clarify a new provision in Chapter 1101

that permits a 3-hour legislative exemption for mandatory continuing education and delete a provision regarding contested case hearings held by TREC.

The amendments are adopted on an emergency basis under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statutes affected by this emergency adoption are Texas Occupations Code, Chapters 1101 and 1102, and Senate Bill 914 and House Bill 1530, 80th Legislature, Regular Session. No other statute, code or article is affected by the emergency adoption.

§535.91. Renewal Notices.

(a) (No change.)

(b) Except [~~On or after January 1, 2005 and except~~] as authorized by §535.92 of this chapter, for the renewal [~~next and all subsequent renewals~~] of a license on active status that is not subject to the annual education requirements of §1101.454 of the Act, the license holder must attend during the term of the current license, at least two Commission-developed legal courses consisting of a three-hour legal update course and a three-hour legal ethics course to comply with the six legal hours of mandatory continuing education required by §1101.455 of the Act. The remaining nine hours required by §1101.455 of the Act may consist of elective credit courses registered with the commission under subchapter G of this chapter.

(c) (No change.)

§535.92. Renewal: Time for Filing; Satisfaction of Mandatory Continuing Education Requirements.

(a) - (j) (No change.)

(k) A [~~Effective January 1, 2005, a~~] course taken by a licensee to obtain any of the following professional designations, or any other real estate related professional designation course deemed worthy by the commission, may be approved on an individual basis for MCE elective credit if the licensee files for credit for the course using MCE Form 15-0 Individual MCE Elective Credit Request for Professional Designation Course and provides the Commission with a copy of the course completion certificate.

(1) - (9) (No change.)

(l) Effective September 1, 2007, a member of the Texas Legislature who is a licensee need only take three (3) hours in legal ethics to the satisfy the legal mandatory continuing education requirements. To obtain an exemption, the licensee must be a current member of the Legislature.

(m) [~~(l)~~] If a licensee is unable to renew a license on the commission's Internet website, the licensee may renew an unexpired license by obtaining a renewal application form from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 and complying with the requirements of this section and §535.91 of this chapter.

§535.94. Hearing on Application Disapproval: Probationary Licenses.

(a) (No change.)

(b) If the commission or a SOAH administrative law judge [~~an employee of the commission authorized by it to conduct hearings and render final decisions in contested cases~~] determines that issuance of a probationary license is appropriate, the order entered with regard to the application must set forth the terms and conditions for the probationary license. Terms and conditions for a probationary license may include any of the following:

(1) - (6) (No change.)

[~~(c) The commission or an employee of the commission authorized to render final decisions in contested cases may, after notice and hearing as provided in §533.17 of this title (relating to Contested Case: Notice of Hearing) and Administrative Procedure Act, Texas Government Code, §§2001.001, et seq. The commission shall advise licensees in renewal notices and license application forms that default on a loan guaranteed by the TGSLC may prevent a subsequent renewal of a license.~~]

(c) [~~(d)~~] Unless the order granting a probationary license specifies otherwise, a probationary licensee may renew the license after the probationary period by filing a renewal application, satisfying applicable education requirements and paying the prescribed renewal fee.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER Q. ADMINISTRATIVE PENALTIES

22 TAC §535.191

The Texas Real Estate Commission (TREC) adopts on an emergency basis new Subchapter Q concerning Administrative Penalties, including new §535.191 concerning Schedule of Administrative Penalties. The new subchapter and rule are adopted on an emergency basis to comply with new legislation that included revisions to Texas Occupations Code Chapter 1101 enacted during the 80th Legislative Session, Regular Session, by Senate Bill 914. The effective date of SB 914 is September 1, 2007. The adoption of the new subchapter and rule permits TREC to comply with the effective date required by the bills.

The new subchapter and rule provide a schedule of administrative penalties to be assessed for violations of the Chapter 1101, Texas Occupations Code, depending on the severity of the violation and other factors detailed in the rules.

The emergency new subchapter and rule are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statute affected by this emergency adoption is Texas Occupations Code, Chapter 1101 and Senate Bill 914, 80th Legislature, R.S. No other statute, code or article is affected by the adopted amendments.

§535.191. Schedule of Administrative Penalties.

(a) The commission may suspend or revoke a license in addition to assessing the administrative penalties set forth in this section.

(b) The administrative penalties set forth in this section take into consideration all of the criteria listed in §1101.702(b) of the Texas Occupations Code.

(c) An administrative penalty range of $100 - $1,500 per violation per day may be assessed for violations of the following sections of the Texas Occupations and Administrative Codes:

(1) §1101.652(a)(8);

(2) §1101.652(b)(23);

(3) §1101.652(b)(29);

(4) 22 TAC §535.92(f);

(5) 22 TAC §535.91(c); and

(6) 22 TAC §535.144.

(d) An administrative penalty range of $500 - $3,000 per violation per day may be assessed for violations of the following sections of the Texas Occupations Code:

(1) §1101.652(a)(7);

(2) §1101.652(b)(1);

(3) §1101.652(b)(7);

(4) §1101.652(b)(8);

(5) §1101.652(b)(10) - (12);

(6) §1101.652(b)(14);

(7) §1101.652(b)(22);

(8) §1101.652(b)(26) - (28);

(9) §1101.652(b)(30) - (31); and

(10) §1101.654(a).

(e) An administrative penalty range of $1,000 - $5,000 per violation per day may be assessed for violations of the following sections:

(1) §1101.351(a);

(2) §1101.652(a)(3);

(3) §1101.652(a)(9);

(4) §1101.652(b)(2) - (6);

(5) §1101.652(b)(9);

(6) §1101.652(b)(13);

(7) §1101.652(b)(15) - (17);

(8) §1101.652(b)(19) - (21);

(9) §1101.652(b)(24) - (25); and

(10) §1101.652(b)(32).

(f) The commission may assess an additional administrative penalty of up to two times that assessed under subsections (c), (d) and (e) of this section if a person has a history of previous violations.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §§535.206, 535.208, 535.210 - 535.212, 535.215, 535.216, 535.224

The Texas Real Estate Commission (TREC) adopts on an emergency basis amendments to §535.206, concerning the Texas Real Estate Inspector Committee, §535.208, concerning Application for a License and adopts by reference new Form REI 8-0, Certificate of Insurance, §535.210, concerning Fees, new §535.211, concerning Professional Liability Insurance, §535.212, concerning Education and Experience Requirements for an Inspector License, §535.215, concerning Inactive Inspector Status, §535.216, concerning Renewal of License or Registration, and §535.224, concerning Practice and Procedure. The amendments and new rules are adopted on an emergency basis to comply with new legislation that included revisions to Texas Occupations Code Chapter 1102 enacted during the 80 Legislative Session, Regular Session, by Senate Bill 914 and House Bill 1530. The effective date of SB 914 and HB 1530 is September 1, 2007. The adoption of the emergency revisions and new rule permits TREC to comply with the effective date required by both bills.

The amendments to §535.206 provide the standards for membership on the Real Estate Inspector Advisory Committee, the amendments to §535.208 provide for home inspector applicants to show proof of professional liability insurance, the amendments to §535.210 establish the fee for an educational evaluation of $30, new §535.211 provides for home inspector applicants to show proof of professional liability insurance, the amendments to §535.212 provide that under the alternative licensing method for a real estate and professional inspector license, an applicant must have education and experience in lieu of the traditional requirements under three-tier method of licensure, the amendments to §535.215 provide that a license will revert to inactive status if a licensee is unable to maintain professional liability insurance coverage as required by law, the amendments to §535.216 provide for home inspector renewal applicants to show proof of professional liability insurance, and the amendments to §535.224 delete provisions that authorized the committee to hear disciplinary cases as such cases must, under the new laws, be heard by the State Office of Administrative Hearings.

The amendments are adopted on an emergency basis under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and

to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statutes affected by this emergency adoption are Texas Occupations Code, Chapters 1101 and 1102 and Senate Bill 914, and House Bill 1530, 80th Legislature, R.S. No other statute, code or article is affected by the adopted amendments.

§535.206. The Texas Real Estate Inspector Committee.

(a) The [~~composition and~~] functions of the committee are as prescribed by Texas Occupations Code, Chapter 1102.

(b) The committee consists of nine members appointed by the commission as follows:

(1) six members who have been engaged in the practice of real estate inspecting as professional inspectors for at least five years before the member's appointment and who are actively engaged in that practice; and

(2) three members who represent the public, who are not registered, certified, or licensed by an occupational regulatory agency in the real estate industry.

(c) Appointments to the committee shall be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointee.

(d) Members of the committee serve staggered six-year terms, with the terms of two inspector members and one public member expiring on February 1 of each odd-numbered year. Initial appointments may be made for terms shorter than six years in order to establish staggered terms. A member holds office until the member's successor is appointed. If a vacancy occurs during a member's term, the commission shall appoint a person to fill the unexpired term.

(e) At a regular meeting in February of each year, the committee shall elect from its members a presiding officer, assistant presiding officer, and secretary.

(f) The commission may remove a committee member if the member:

(1) does not have the qualifications required by subsection (b)(1) of this section if the member is appointed as a professional inspector;

(2) cannot discharge the member's duties for a substantial part of the members term;

(3) is absent from more than half of the regularly scheduled commission meetings that the member is eligible to attend during each calendar year, unless the absence is excused by majority vote of the committee; or

(4) violates Texas Occupations Code, Chapter 1102.

(g) If the administrator of the commission has knowledge that a potential ground for removal exists, the administrator shall notify the presiding officer of the commission that the potential ground exists.

(h) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a committee member exists.

(i) The committee may meet at the call of a majority of its members. The committee shall meet at the call of the commission.

(j) [~~(b)~~] A quorum of the committee consists of five members.

(k) [~~(c)~~] The committee shall conduct its meetings in substantial compliance with Robert's Rules of Order.

(l) [~~(d)~~] The secretary of the committee, or in the secretary's absence, a member designated by the chairman, shall prepare written minutes of each meeting and submit the minutes to the committee for approval and for filing with the commission.

(m) [~~(e)~~] The committee shall submit semiannual reports to the commission on or before March 1 and September 1 of each year detailing the performance of the committee. The commission may require the report to be submitted on a form approved by the commission for that purpose. The committee may submit its written recommendations concerning the licensing and regulation of real estate inspectors to the commission at any time the committee deems appropriate. If the commission submits a [~~proposed~~] rule to the committee for development, the chairman of the committee or the chairman's designate shall report to the commission after each meeting at which the proposed rule is discussed on [~~a monthly basis with regard to~~] the committee's consideration of the rule.

(n) The committee is automatically abolished on September 1, 2019 unless the commission subsequently establishes a different date.

[~~(f) Hearings before the committee concerning the licensing or discipline of real estate inspectors will be conducted in accordance with §535.221 of this title (relating to Proceedings before the Committee)~~].

§535.208. Application for a License.

(a) A person desiring to be licensed shall file an application using forms prescribed by the commission. Prior to filing an application for a real estate inspector license or for a professional inspector license, the applicant must pay the required fee for evaluation of the education completed by the person and must obtain a written response from the commission showing the applicant meets current education requirements for the license. The commission may require an applicant to furnish materials such as source outlines, syllabi, course descriptions or official transcripts to verify course content or credit. The commission may not accept an application for filing if the application is materially incomplete or the application is not accompanied by the appropriate fee. The commission may not issue a license unless the applicant:

(1) - (3) (No change.)

(4) provides all supporting documentation or information requested by the commission in connection with the application; and

(5) submits proof of professional liability insurance as required by Chapter 1102 and §535.211 of this title (relating to Professional Liability Insurance).

(b) (No change.)

(c) The Texas Real Estate Commission adopts by reference the following forms approved by the commission. These forms are published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188:

(1) - (4) (No change.)

(5) Certificate of Insurance, Form REI 8-0 [~~Business License Application for Professional Inspector License by a Limited Liability Company or Corporation, Form REI 7-0~~].

(d) An application shall be considered void and subject to no further evaluation or processing when one of the following events occurs.

(1) - (3) (No change.)

(4) The applicant fails to submit the required proof of professional liability insurance within 60 days after the commission makes written request for proof of insurance.

(e) - (f) (No change.)

§535.210. Fees.

(a) The commission shall charge and collect the following fees:

(1) - (8) (No change.)

(9) a fee of $30 [~~$10~~] for transcript evaluation [~~filing an original application for a license as a professional inspector by a corporation or limited liability company~~];

[~~(10) a fee of $5 for the annual renewal of the license of a professional inspector by a corporation or limited liability company;~~]

(10) [~~(11)~~] a fee of $20 for requesting issuance of a license because of a change of name, return to active status, or change in sponsoring professional inspector; and

(11) [~~(12)~~] a fee of $100 for deposit in the real estate inspection recovery fund upon an applicant's successful completion of an examination. [~~This fee does not apply to application for a license as a professional inspector by a corporation or limited liability company.~~]

(b) (No change.)

§535.211. Professional Liability Insurance.

(a) When an applicant for a license issued under Chapter 1102 has met all other licensing requirements, the commission shall notify the applicant that the applicant must provide proof of professional liability insurance before the license will be issued.

(b) An inspector must maintain professional liability insurance coverage during the period the license is active.

(c) The applicant must provide proof of insurance on Certificate of Insurance form REI 8-0 signed by the applicant's insurance agent.

(d) An inspector must notify the commission within 10 days of the cancellation or non-renewal of professional liability insurance coverage.

(e) An inspector must retain sufficient records of professional liability insurance coverage to document to the commission continuous coverage for the preceding two year license period.

§535.212. Education and Experience Requirements for an Inspector License.

(a) (No change.)

(b) Experience and additional education requirements.

(1) An applicant may substitute the following experience or additional education in lieu of the number of real estate inspections required by Chapter 1102, Texas Occupations Code and in lieu of the requirement that the applicant has previously been licensed for a specified time as an apprentice inspector or a real estate inspector:

(A) For a real estate inspector license, the applicant must have completed at least 30 additional hours of core real estate inspection courses acceptable to the commission, with at least 10 hours of credit each for the structural, mechanical (including appliances, plumbing, and HVAC components) and electrical systems found in improvements to real property. The [~~, or the~~] applicant must also provide documentation satisfactory to the commission to establish that the person has been licensed or registered at least three years as an architect, professional engineer, or engineer-in-training, or has at least five years of personal experience inspecting, installing, servicing, repairing or maintaining each of the structural, mechanical and electrical systems found in improvements to real property. Documentation of experience must include two reference letters from persons other than the applicant who have personal knowledge of the applicant's occupation and work.

[~~(B) Prior to January 1, 2005, for a professional inspector license, the applicant must have completed at least 60 additional hours of core real estate inspection courses acceptable to the commission, with at least 20 hours of credit each for the structural, mechanical (including appliances, plumbing, and HVAC components) and electrical systems found in improvements to real property, or provide documentation satisfactory to the commission to establish that the person has been licensed or registered at least five years as an architect, professional engineer, or engineer-in-training, or has at least seven years of personal experience inspecting, installing, servicing, repairing or maintaining each of the structural, mechanical and electrical systems found in improvements to real property. Documentation of experience must be in verified form and from persons other than the applicant who have personal knowledge of the applicant's occupation and work.~~]

(B) [~~(C)~~] For [~~Effective January 1, 2005, for~~] a professional inspector license, the applicant must have completed at least 320 additional hours of education acceptable to the commission. The additional 320 education hours must include 45 hours in Foundation Systems, 40 hours in Roof Systems, 45 hours in Framing, 40 hours in Electrical Systems, 40 hours in HVAC Systems, 40 hours in plumbing, 20 hours in Building Enclosure, 10 hours in Appliances, 15 hours in Standards of Practice/Legal/Ethics, 15 hours in Standard Report Form/Report Writing, and 10 hours of other approved courses. The applicant must also [~~or~~] provide documentation satisfactory to the commission to establish that the person has been licensed or registered at least five years as an architect, professional engineer, or engineer-in-training, or has at least seven years of personal experience inspecting, installing, servicing, repairing or maintaining each of the structural, mechanical and electrical systems found in improvements to real property. Documentation of experience must include two reference letters from persons other than the applicant who have personal knowledge of the applicant's occupation and work.

(2) (No change.)

§535.215. Inactive Inspector Status.

(a) For the purposes of this section, an "inactive" inspector is a licensed professional inspector, real estate inspector, or apprentice inspector who is not authorized by law to engage in the business of performing real estate inspections as defined by Texas Occupations Code, Chapter 1102, and who has been placed on inactive status by the commission for any of the following reasons:

(1) - (4) (No change.)

(5) the expiration, suspension, or revocation of the license of the inspector's sponsoring professional inspector; [~~,~~]

(6) the failure of the licensee to provide to the commission proof of professional liability insurance; or

(7) the expiration or non-renewal of the inspector's professional liability insurance.

(b) - (f) (No change.)

§535.216. Renewal of License or Registration.

(a) A person licensed by the commission under Texas Occupations Code, Chapter 1102 (Chapter 1102), may renew the license by timely filing the prescribed application for renewal, paying the appropriate fee to the commission and satisfying applicable continuing education requirements as required by Chapter 1102, and by §535.218 of this title (relating to Continuing Education), and providing to the commission proof of professional liability insurance with a minimum

limit of $100,000 per occurrence as required by §535.211 of this title (relating to Professional Liability Insurance) and §1102.203, Texas Occupations Code.

(b) (No change.)

(c) A licensee also may renew an unexpired license by accessing the commission's Internet web site, entering the required information on the renewal application form, satisfying applicable education and professional liability insurance requirements and paying the appropriate fee in accordance with the instructions provided at the site by the commission.

(d) (No change.)

[~~(e) The commission may not renew a license issued to a corporation or limited liability company unless the corporation or limited liability company has designated an officer, manager or employee who meets the requirements of Chapter 1102, Texas Occupations Code, including satisfaction of continuing education requirements. No person may act as designated officer, designated manager or designated employee if the person has failed to meet continuing education requirements. For the purpose of this section, continuing education requirements for the designated officer, designated manager or designated employee must be satisfied during the term of any individual professional inspector license held by the officer, manager or employee.~~]

(e) [~~(f)~~] A renewal application is deemed filed when placed in the mail properly addressed to the commission with appropriate postage paid.

(f) [~~(g)~~] An inspector licensed on active status who timely files a renewal application together with the applicable fee, [~~and~~] evidence of completion of any required continuing education courses, and proof of professional liability insurance may continue to practice prior to receiving a new license certificate from the commission. If the license has expired and the licensee files an application to renew the license, the licensee may not practice until the new certificate is received.

§535.224. Practice and Procedure [~~Proceedings before the Committee~~].

[~~(a) The committee may be authorized by the commission to conduct administrative hearings or recommend the entry of final orders by the commission, or both, in contested cases regarding:~~]

[~~(1) professional inspectors, real estate inspectors, or apprentice inspectors who are alleged to have violated a provision of Texas Occupations Code, Chapter 1102 (1102) or a rule of the commission;~~]

[~~(2) persons whose applications for licensing as professional inspectors, real estate inspectors or as apprentice inspectors have been initially denied by the commission on a ground relating to the applicant's honesty, trustworthiness and integrity; and~~]

[~~(3) professional inspectors, real estate inspectors, or apprentice inspectors who have been convicted of a criminal offence listed in §541.1 of this title (relating to Criminal Offense Guidelines).~~]

[~~(b) If the committee determines after a hearing that disciplinary action is warranted, the committee may recommend that the commission issue a reprimand, or suspend or revoke a license. The committee may recommend that an order of suspension or revocation be probated in whole or in part by the commission or that the probation be subject to reasonable terms and conditions in the manner contemplated by Texas Occupations Code, Chapter 1101, §1101.656. The committee may recommend that the commission enter a final order denying a license or that a probationary license be issued in the manner contemplated by §535.91 of this title (relating to Hearing on Application Disapproval; Probationary License).~~]

(a) [~~(c)~~] Proceedings [~~before the committee~~] shall be conducted [~~by the committee~~] in the manner contemplated by §§533.31 - 533.39 [~~§§535.31 - 533.39~~] of this title (relating to Practice and Procedure) and with the Government Code, Chapter 2001, et[~~.~~] seq. [~~. The chairman of the committee or a member designated by the chairman shall act as presiding officer and may vote as any other member.~~]

(b) [~~(d)~~] In addition to the grounds for disciplinary action provided in Chapter 1102, a license of an inspector may be suspended or revoked by the commission if the inspector:

(1) fails to make good a check issued to the commission within 30 days after the commission had mailed a request for payment by certified mail to the inspector's last known business address as reflected by the commission's records;

(2) fails or refuses on demand to produce a document, book or record in his possession concerning a real estate inspection conducted by him for examination by the commission or its authorized agent; [~~or~~]

(3) fails within 10 days to provide information requested by the commission or its authorized agent in the course of an investigation of a complaint; [~~.~~]

(4) fails to maintain professional liability insurance coverage during the period a license is active; or

(5) fails to notify the commission within 10 days of the cancellation or non-renewal of professional liability insurance coverage.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703576
Loretta DeHay
Interim Administrator and General Counsel
Texas Real Estate Commission
Effective Date: September 1, 2007
Expiration Date: December 29, 2007
For further information, please call: (512) 465-3900

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22 TAC §535.209

(Editor's note: The text of the following section adopted for repeal on an emergency basis will not be published. The section may be examined in the offices of the Texas Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Real Estate Commission (TREC) adopts on an emergency basis the repeal of §535.209 concerning Professional Inspector Corporations and Limited Liability Companies.

The repeal is adopted on an emergency basis to comply with new legislation that included revisions to Texas Occupations Code Chapter 1102 enacted during the 80th Legislative Session, Regular Session, by House Bill 1530. As HB 1530 repealed the licensure requirements for corporations and limited liability companies that engage in home inspection services for a fee, the rules enacted under these provisions are repealed. The adoption of the emergency repeal permits TREC to comply with the effective date required by the bill. The effective date of HB 1530 is September 1, 2007.

The repeal is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statutes affected by this emergency adoption are Texas Occupations Code, Chapter 1102 and House Bill 1530, 80th Legislature, R.S. No other statute, code or article is affected by the adopted amendments.

§535.209. Professional Inspector Corporations and Limited Liability Companies.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703568
Loretta DeHay
Interim Administrator and General Counsel
Texas Real Estate Commission
Effective Date: September 1, 2007
Expiration Date: December 29, 2007
For further information, please call: (512) 465-3900

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CHAPTER 539. PROVISIONS OF THE RESIDENTIAL SERVICE COMPANY ACT
SUBCHAPTER O. ADMINISTRATIVE PENALTIES

22 TAC §539.140

The Texas Real Estate Commission (TREC) adopts on an emergency basis new Chapter O concerning Administrative Penalties including new §539.140 concerning Schedule of Administrative Penalties. The new subchapter and rule are adopted on an emergency basis to comply with new legislation that included revisions to Texas Occupations Code Chapter 1303 enacted during the 80th Legislative Session, Regular Session, by Senate Bill 914. The effective date of SB 914 is September 1, 2007. The adoption of the new subchapter and rule permits TREC to comply with the effective date required by the bills.

The new subchapter and rules provide a schedule of administrative penalties to be assessed for violations of the Residential Service Company Act depending on the severity of the violation and other factors detailed in the rules.

The emergency new subchapter and rule are adopted under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary to implement Chapter 1303.

The statute affected by this emergency adoption is Texas Occupations Code, Chapter 1303 and Senate Bill 914 80th Legislature, R.S. No other statute, code or article is affected by the adopted amendments.

§539.140. Schedule of Administrative Penalties.

(a) The administrative penalties set forth in this section take into consideration all of the criteria listed in §1303.355(c) of the Texas Occupations Code.

(b) An administrative penalty range of $100 - $1,500 per violation per day may be assessed for violations of the following sections of the Texas Occupations and Administrative Codes:

(1) 22 TAC §539.137(b);

(2) §1303.202(a);

(3) §1303.202(b);

(4) §1303.052; and

(5) §1303.352(a)(1).

(c) An administrative penalty range of $500 - $5,000 per violation per day may be assessed for the following violations of the Texas Occupations and Administrative Codes:

(1) §1303.101;

(2) §1303.151;

(3) 22 TAC §539.81;

(4) §1303.153;

(5) §1303.352(a)(2);

(6) §1303.352(a)(3); and

(7) §1303.352(6).

(d) The commission may assess an additional administrative penalty of up to two times that assessed under subsections (a), (b) and (c) of this section if the residential service company has a history of previous violations.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

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Loretta DeHay
Interim Administrator and General Counsel
Texas Real Estate Commission
Effective Date: September 1, 2007
Expiration Date: December 29, 2007
For further information, please call: (512) 465-3900

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 5. BUDGET AND PLANNING OFFICE

SUBCHAPTER A. FEDERAL AND INTERGOVERNMENTAL COORDINATION

DIVISION 3. STATE PLANNING ASSISTANCE GRANTS

1 TAC §§5.83, 5.85, 5.87

The Office of the Governor proposes the amendment of Subchapter A, §§5.83, 5.85, and 5.87.

The proposed amendment to §5.83 updates the language of this section to conform it to the requirements of §391.0095 of the Local Government Code by requiring a regional planning commission ("commission") to provide copies of its annual audit to the State Auditor, the Comptroller of Public Accounts, and the Legislative Budget Board; allowing the Office of the Governor to request the State Auditor or an external auditor to review a commission's annual audit; requiring the State Auditor to report any findings and recommendations to the Legislative Audit Committee and the Office of the Governor; requiring an external auditor to report any findings and recommendations to the Office of the Governor, the State Auditor, and the appropriate legislative oversight committee; and clarifying that an annual audit must be paid for from commission funds. The proposed amendment also uses the name "the Office of the Governor" in a consistent manner throughout the section.

The proposed amendment to §5.85 updates the language of this section to conform it to the requirements of §391.0117 of the Local Government Code by requiring a commission to submit its salary schedule to the State Auditor and clarifying the responsibilities of the Office of the Governor and the State Auditor regarding a commission's salary schedules. The proposed amendment also uses the name "the State Auditor" in a consistent manner throughout the section.

The proposed amendment to §5.87 updates the language of this section to conform it to the requirements of §391.0095 of the Local Government Code, and to satisfy recommendations made by State Auditor's Office in its Review of Regional Planning Commissions' Financial and Performance Reports (SAO Report No. 03-013; Released 12/30/02), by requiring a commission to submit its reports to the State Auditor, the Office of the Governor, the Legislative Budget Board, and the Comptroller of Public Accounts and requiring the State Auditor to report to the Office of the Governor any failure of a regional planning commission to submit a required report. The proposed amendment also specifies the types of information that must be included in commission reports. In addition, the proposed amendment uses the name "the Office of the Governor" in a consistent manner throughout the section.

The proposed amendment of §§5.83, 5.85, and 5.87 is intended to improve the accountability of the commissions in the use of state and federal funds and to assist in promoting more effective oversight of the commissions.

Denise S. Francis, Single Point of Contact, has determined that, for the first five-year period the amended sections as proposed are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amended sections.

Ms. Francis has also determined that, for the first five-year period that the sections are in effect, the public benefit anticipated as a result of enforcing the amended sections as proposed will be more efficient processes and procedures and the current rules will be more easily understood. There will be no anticipated economic cost to persons or businesses for complying with the proposed rule amendments.

Comments on the proposed amendment of §§5.83, 5.85, and 5.87 may be submitted to Denise S. Francis, Single Point of Contact, Governor's Office of Budget, Planning and Policy, P. O. Box 12428, Austin, Texas 78711, (512) 463-8465, dfrancis@governor.state.tx.us. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The proposed amendment of §§5.83, 5.85, and 5.87 is proposed under §391.009 of the Local Government Code, which provides the Office of the Governor with the authority to adopt rules regarding the operation and oversight of commissions, the receipt and expenditure of funds by commissions, the annual reporting requirements of commissions, the audit requirements on funds received or expended by commissions, the establishment and the use of standards by which the productivity and performance of commissions can be evaluated, and the guidelines that commissions and governmental units must follow in carrying out the review and comment procedures for loans and grants-in-aid.

The proposed amendment of §5.83 and §5.87 implements §391.0095 of the Local Government Code regarding reporting and audit requirements for commissions.

The proposed amendment of §5.85 implements §391.0117 of the Local Government Code regarding salary schedules for commissions.

No other statutes, articles, or codes are affected by the proposed amendment of these rules.

§5.83. Financial Audit Requirements.

(a) Not later than nine months after the close of each regional planning commission's fiscal year, each regional planning commission shall submit to the Office of the Governor a complete financial audit prepared by a certified public accountant, in accordance with generally accepted financial auditing procedures and the provisions of OMB Circular A-133 and the State Single Audit Circular, if applicable. A copy of the annual audit shall be submitted to the State Auditor, the Comptroller of Public Accounts, and the Legislative Budget Board.

(b) The annual audit will be commissioned by the governing body of the regional planning commission unless the Office of the Governor [~~governor~~] notifies each affected regional planning commission in writing at least 120 days prior to the end of the regional planning commission's fiscal year for which the audit would be performed that the [~~Governor's~~] Office of the Governor intends to commission the audit.

(c) The [~~In lieu of commissioning the audit, the~~] Office of the Governor will place primary reliance upon state single [~~may require specific elements to be included in the annual~~] audit coordinating agencies to review regional planning commission audits. However, the Office of the Governor may request that regional planning commission audits be reviewed by the State Auditor or by an external auditor. The State Auditor may review the audits, subject to approval by the Legislative Audit Committee for inclusion in the audit plan under §321.013, Government Code. If an audit is reviewed by the State Auditor, any findings and recommendations shall be reported to the Legislative Audit Committee and the Office of the Governor. If an audit is reviewed by an external auditor, any findings and recommendations shall be reported to the Office of the Governor, the State Auditor, and the appropriate legislative oversight committees.

(d) The annual [~~governor will place primary reliance upon state single~~] audit shall include: [~~coordinating agencies to review regional planning commission audits. However, the governor may require planning commission audits to be reviewed by Office of the Governor auditors or by a third party or parties.~~]

(1) the amount and source of funds received by the regional planning commission;

(2) the amount and source of funds expended by the regional planning commission;

(3) an explanation of any method used by the regional planning commission to compute an expense of the regional planning commission, including computation of any indirect cost of the regional planning commission;

(4) a statement of indirect costs which compares actual indirect cost allocations with the proposed indirect cost allocation plan used to establish an indirect cost rate; and

(5) any other information required by the Office of the Governor.

(e) The Office of the Governor may, by rule, establish standards and guidelines which regional planning commissions must use in selecting independent auditors. [~~The audit shall include:~~]

[~~(1) the amount and source of funds received by the regional planning commission;~~]

[~~(2) the amount and source of funds expended by the regional planning commission;~~]

[~~(3) an explanation of any method used by the regional planning commission to compute an expense of the regional planning commission, including computation of any indirect cost of the regional planning commission; and~~]

[~~(4) a statement of indirect costs which compares actual indirect cost allocations with the proposed indirect cost allocation plan used to establish an indirect cost rate.~~]

(f) Audit costs are allowable costs as identified in the Uniform Grant Management Standards (Chapter 783, Government Code) and are allocable to the various programs administered by a [~~The Office of the Governor may, by rule, establish standards and guidelines which~~] regional planning commission [~~commissions must use in selecting independent auditors~~].

(g) The annual audit, whether commissioned by the governing body of the [~~Audit costs are allowable costs as identified in the Uniform Grant Management Standards (Chapter 783, Texas Government Code) and are allocable to the various programs administered by a~~] regional planning commission or the Office of the Governor, shall be paid for from the funds of the regional planning commission.

§5.85. Required Prior Approval of Salaries.

(a) - (b) (No change.)

(c) A salary for a position classified under the regional planning commission's salary schedule may not exceed the state salary as prescribed in the General Appropriations Act [~~that has been approved by the state auditor's office~~] for comparable work.

(d) A position may only be exempted from the classification salary schedule adopted by the regional planning commission if the exemption and the salary paid for the exempt position is within the range prescribed by the General Appropriations Act [~~determined appropriate for state exempt positions by the state auditor~~].

(e) Salaries charged to state grant funds, directly or indirectly, will be considered reasonable to the extent that they are comparable to salaries paid for similar positions in the labor market in which the employing regional planning commission competes for the kinds of positions involved. Wage and salary comparability will be determined from the [~~State Auditor's~~] state classification plan, positions exempt from the state classification plan, the State Auditor's biennial reports on state classification and pay, and State Auditor's reports on benefits as a percentage of salary, as well as the U.S. Department of Labor's Employment Cost index and other appropriate sources, including documentation provided by the regional planning commission.

(f) Not later than the 45th day before the date of the beginning of each regional planning commission's fiscal year, a [~~A~~] regional planning commission shall [~~annually~~] submit to the State Auditor[~~, as approved by its governing board,~~] its salary schedule, as approved by its governing board, including the salaries of all exempt positions[~~, to the director of the Office of the Governor's Budget and Planning Division not later than the 45th day before the date of the beginning of the regional planning commission's fiscal year~~].

[~~(1) If, within 30 days of the submission, the Office of the Governor has not responded in writing disapproving the schedule, the salaries shall be deemed to have been accepted.~~]

[~~(2) If the governor objects to a regional planning commission's salary schedule, or a portion thereof, the regional planning commission shall be so notified in writing within 30 days of receipt of the schedule, and the portion of the schedule that the governor objects to may not go into effect until revisions or explanations are given that are satisfactory to the governor and the governor approves that portion of the schedule.~~]

[~~(3) A disapproved portion of a salary schedule may not be paid directly or indirectly from state-appropriated funds.~~]

[(4) Actual salary rates paid to employees in either classified or exempt positions may be adjusted from time to time during the commission's fiscal year so long as the resultant actual salary rate does not exceed the applicable maximum rate established in the schedule submitted in accordance with this subsection.]

(g) If the State Auditor, subject to the Legislative Audit Committee's approval for inclusion in the audit plan under §321.013, Government Code, has recommendations to improve a regional planning commission's salary schedule or a portion of the schedule, the State Auditor shall report the recommendations to the Office of the Governor [This section does not apply to a regional planning commission if the most populous county that is a member of the regional planning commission has an actual average weekly wage that exceeds the state actual average weekly wage by 20% or more for the previous year as determined by the Texas Workforce Commission in its County Employment and Wage Information Report].

[(1) A regional planning commission exempted from the salary provisions by this subsection shall annually file an exemption notice with the director of the Office of the Governor, Budget and Planning Division.]

[(2) The exemption notice shall contain supporting information from the Texas Work Force Commission's County Employment and Wage Information Report for the applicable period.]

(h) The Office of the Governor may not allow the portion of the schedule for which the State Auditor has recommendations to go into effect until revisions or explanations are given that are satisfactory to the Office of the Governor based on recommendations from the State Auditor.

(i) This section does not apply to a regional planning commission if the most populous county that is a member of the regional planning commission has an actual average weekly wage that exceeds the state actual average weekly wage by 20% or more for the previous year as determined by the Texas Workforce Commission in its County Employment and Wage Information Report.

(1) A regional planning commission exempted from the salary provisions by this subsection shall annually file an exemption notice with the State Auditor.

(2) The exemption notice shall contain supporting information from the Texas Work Force Commission's County Employment and Wage Information Report for the applicable period.

§5.87. Reports.

(a) Not later than 90 days following the end of each regional planning commission's fiscal year, each [Each] regional planning commission shall submit [provide annually] to the State Auditor, [director of] the Office of the Governor, the Legislative Budget Board, and the Comptroller of Public Accounts[Governor's Budget and Planning Division, not later than 90 days following the end of the regional planning commission's fiscal year]:

(1) a report of the regional planning commission's productivity and performance during the annual reporting period, based upon the annual work program required by §5.90 of this chapter. The report shall include: [title (relating to Annual Work Program);]

(A) the results of the program's activities at the most detailed level reported to each program's sponsoring agency, including outcome and output measures;

(B) a comparison of planned performance and actual results; and

(C) an analysis of progress made toward achieving goals and objectives required by §5.90 of this chapter relating to the annual work program;

(2) a projection of the regional planning commission's productivity and performance during the next annual reporting period based upon the annual work program required by §5.90 of this chapter [title];

(3) a report of any assets disposed of by the regional planning commission. The report shall include:

(A) a summary of the activities performed to dispose of the assets;

(B) an itemized list describing each asset disposed of;

(C) the acquisition date of each asset disposed of;

(D) the purchase price of each asset disposed of;

(E) the reason for disposing of each asset;

(F) the disposition date of each asset disposed of; and

(G) the final disposition price for each asset disposed of.

(b) If a [A] regional planning commission fails to submit any [shall send to the governor, the state auditor, the comptroller, and the Legislative Budget Board a copy of each] report [or audit] required under this section, the State Auditor shall report the failure to the Office of the Governor. [these rules. If the governor determines that there is a question about the appropriateness of an expenditure or other action of a regional planning commission, the governor shall report the expenditure or other action to the state auditor for review.]

(c) A regional planning commission [An entity required to file an audit or a report under these rules] shall submit any other report or [file the initial] audit required by the Office of the Governor [or report not later than September 1, 2000].

[(d) A regional planning commission shall submit any other report or audit required by the governor.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 8, 2007.

TRD-200703470
David Zimmerman
Assistant General Counsel
Office of the Governor
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 936-0181

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 7. PESTICIDES

SUBCHAPTER H. STRUCTURAL PEST CONTROL ADVISORY COMMITTEE

4 TAC §§7.190 - 7.196

The Texas Department of Agriculture (Department) proposes new Chapter 7, Subchapter H., §§7.190 - 7.196, concerning the new Structural Pest Control Advisory Committee. This new committee was created by the enactment of House Bill 2458 by the 80th Legislature, Regular Session, 2007. House Bill 2458 abolished the Texas Structural Pest Control Board (Board), transferred the functions previously performed by the Board to the Department, and created the Structural Pest Control Advisory Committee, which has the purpose of gathering and providing information to the Department and the Commissioner of Agriculture on issues affecting the practice of structural pest control in the state of Texas and advising the department and the commissioner on specific areas relating to the practice of structural pest control. New §7.190 provides definitions to be used in the new subchapter. New §7.191 provides a statement of the purpose of the committee. New §7.192 provides information about the membership of the committee. New §7.193 provides information about appointment of committee members. New §7.194 provides additional qualifications for committee members. New §7.195 provides grounds for disqualification from membership. New §7.196 provides requirements for committee meetings

Jimmy Bush, Assistant Commissioner for Pesticide Programs, has determined that for the first five-year period the new sections are in effect there may be fiscal implications for state government as result of enforcing and administering the new sections, most notably the costs associated with the formation of the new committee, however cost savings due to centralization of regulation of pesticide use in the state of Texas within the Department, which already had regulatory authority over the use of pesticides for agricultural purposes, combined with economies of scale and elimination of duplication of effort, should produce eventual cost savings to the state. The exact amount of costs and eventual savings cannot be precisely determined. There will be no fiscal implications for local government as result of enforcing and administering the new sections.

Mr. Bush also has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be the establishment of a broad-based advisory committee to aid the department in the standardization of regulation of pesticide use for all purposes in the state of Texas, increased efficiency in detection and deterrence of illegal or inappropriate use of pesticides in the area of structural pest control, and increased efficiency in the regulation of appropriate pesticide use. For the first five-year period the new sections are in effect, there will be no additional costs anticipated to microbusinesses, small businesses or individuals required to comply with the new sections.

Comments on the proposal may be submitted to Jimmy Bush, Assistant Commissioner for Pesticide Programs, at the Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

New §§7.190 - 7.196 are proposed under Occupations Code, §1951.105, as amended by House Bill 245, 80th Legislature, Regular Session, 2007, which requires the Department to adopt rules for the operation of the Structural Pest Control Advisory Committee.

The Code affected by the proposal is the Occupations Code, Chapter 1951.

§7.190. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commissioner--the Commissioner of the Texas Department of Agriculture, or his designee.

(2) Committee--the Structural Pest Control Advisory Committee.

(3) Department--the Texas Department of Agriculture.

§7.191. Purpose of the Committee.

(a) The Structural Pest Control Advisory Committee shall be composed of nine members appointed by the Commissioner.

(b) The Committee shall meet regularly, as prescribed by section 7.196 of this title, to consider matters relating to the regulation and licensing of persons engaged in the business of structural pest control. The Commissioner, or his designee, shall have the authority to direct that the Committee include on its agenda any matters relating to the business of structural pest control, or the licensing and regulation of persons engaged in that business.

(c) The Committee shall gather and provide information to the Commissioner regarding the practice of structural pest control in order to aid the Commissioner and the Department to provide excellent customer service to the public and the structural pest control industry; to enhance educational and professional standards of license holders; and, to protect the health, safety and welfare of the public.

(d) The Committee shall advise the Commissioner and the Department regarding the licensing and regulation of persons engaged in structural pest control, including advice on:

(1) education and curricula requirements for applicants for licensure;

(2) the content of examinations of applicants;

(3) proposed rules on technical issues related to structural pest control and enforcement of laws related to structural pest control;

(4) standards and criteria for the issuance of licenses;

(5) fees for licenses; and

(6) other issues relating to the practice of structural pest control.

§7.192. Membership of the Committee.

(a) The Committee shall be composed of nine members as follows:

(1) two members shall be experts in structural pest control application;

(2) three members shall represent the interest of the public;

(3) one member from an institution of higher education and who is knowledgeable in the science of pests and pest control;

(4) one member representing the interest of structural pest control operators, whose appointment shall be based on recommendations to the Commissioner by a trade association of operators;

(5) one member representing the interest of consumers, whose appointment shall be based on recommendations to the Commissioner by consumer advocacy groups or associations; and

(6) the Commissioner of State Health Services, or his/her designee.

(b) The members, other than the Commissioner of State Health Services, shall serve staggered four-year terms. (Initial committee members may serve shorter terms.)

(c) The terms of four members of the Committee shall expire on February 1 of each odd-numbered year.

(d) Service on the Committee by a state officer or employee shall be an additional duty of that member's office or employment.

(e) Members of the Committee shall be appointed without regard to race, color, disability, sex, religion, age or national origin.

(f) The presiding officer of the Committee shall be elected by the members of the Committee at its first meeting, and thereafter a new presiding officer shall be elected for a term of one year at the first meeting held in each successive year.

§7.193. Appointment of Committee Members.

(a) The Commissioner appoints members of the Committee, other than the Commissioner of State Health Services.

(b) The Commissioner may solicit recommendations for prospective Committee members from industry trade associations, consumer advocacy groups, Boards of Regents of colleges and universities or any other groups or entities that have reason to be knowledgeable about or concerned with the structural pest control industry.

(c) The Department shall develop a form that prospective Committee appointees must complete prior to the Commissioner appointing that person to the Committee. The form shall be designed to elicit all information necessary to determine whether the person is qualified to serve as a Committee member.

(d) Other than the appointment of the original Committee members, the Commissioner shall make appointments to the Committee during January of each odd-numbered year, or as necessary to fill vacancies.

(e) The Commissioner may consider the geographic ties of prospective Committee members to assure that the interests of all geographic areas of Texas are represented.

(f) Other than the Commissioner of State Health Services, a person may serve no more than two consecutive four (4) year terms as a member of the Committee.

§7.194. Additional Qualifications for Committee Members.

(a) The two Committee members who are experts in structural pest control application may qualify by having at least five (5) years of experience in the application of pesticides for structural pest control (for purposes of this subsection, 'experience' means either the actual application of pesticide or the ownership and operation of a structural pest control business), or by having a baccalaureate degree in a field of science related to pest control or manufacture of pesticide and three years of work experience in that field.

(b) The Committee member who is from an institution of higher education must have a post-graduate (masters or doctoral) degree and be, at the time of his/her appointment, employed in a teaching capacity at an institution of higher education and have experience teaching courses that demonstrate that the person is knowledgeable in the science of pests and pest control.

(c) All Committee members must successfully complete, during the first calendar quarter of their term, a course provided by the Department or otherwise approved by the Commissioner that covers the Texas Open Meetings Act, the Texas Open Records Act, the Rulemaking process in Texas, the requirements of the conflict of interest or other laws relating to public officials in Texas, and any applicable ethics policies adopted by the Department.

§7.195. Disqualification of Members.

(a) A person may not be appointed as a public member of the Committee if:

(1) the person is licensed under chapter 1951 of the Occupations Code;

(2) the person or the person's spouse:

(A) is registered, certified or licensed by an occupational regulatory agency in the field of pest control;

(B) is employed or participated in the management of a business entity or other organization regulated by or receiving funds from the Department;

(C) owns or controls, directly or indirectly, more than a 10 percent interest in a business entity or other organization regulated by or receiving funds from the Department; or

(D) uses or receives a substantial amount of tangible goods, services or funds from the Department, other than compensation allowed by law for committee membership, attendance or expenses.

(b) A person may not be appointed as a member of the Committee if:

(1) the person is an officer, employee or paid consultant of a Texas trade association in the field of pest control except as provided in §7.192(a)(4) of this title (relating to Membership of the Committee) and §1951.101(a)(4) of the Texas Occupations Code;

(2) the person's spouse is an officer, manager or paid consultant of a Texas trade association in the field of pest control; or

(3) the person is required to register as a lobbyist under Chapter 105 of the Government Code because of the person's activities for compensation on behalf of a profession related to the operation of the Department.

§7.196. Committee Meetings.

(a) The Committee shall meet at least once during each calendar year.

(b) The Committee may meet on other occasions at the direction of the Commissioner.

(c) Meetings of the Committee shall be posted and held in conformity with the Texas Open Meetings Act.

(d) In order for the Committee to meet and take any action, at least five (5) of the nine members must be present to constitute a quorum.

(e) During the first meeting of each calendar year the Committee will include on its agenda as an item of business a self-assessment of its actions during the prior year.

(1) The self-assessment will be done using a process and on a form prepared by the Commissioner or his designee.

(2) In addition to evaluating its performance during the prior calendar year, the Committee shall establish goals to improve performance during the upcoming year.

(3) The Committee shall forward the self-assessment to the Commissioner for comment, which will be considered at the next subsequent meeting of the Committee after receipt of the Commissioner's comments.

(f) The Committee shall conduct its meetings using procedural rules which substantially comport with Roberts' Rules of Order.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200703533
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 300. ADMINISTRATION

10 TAC §300.11

The Texas Residential Construction Commission (commission) proposes new rule 10 Texas Administrative Code §300.11 (10 TAC §300.11) regarding the meetings of the commission. The proposed new rule will give the public a greater understanding of how an open meeting is conducted and the role that a member of the public may play in the proceedings.

Ms. Susan Durso, General Counsel for the commission, has determined that for each year of the first five year period that the proposed new rule is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section.

Ms. Durso has also determined that for the first five years the proposed new rule is in effect the public will benefit from a clearer understanding of how an open meeting is conducted and how to address the commission in an open meeting. There will be no effect on individuals, or large, small or micro businesses as a result of the proposed new rule.

Ms. Durso has also determined that for each year of the first five-year period the proposed new rule is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new rule may be submitted to Susan K. Durso, General Counsel, Texas Residential Construction Commission, 311 E. 14th Street, Austin, Texas 78701 or by fax to (512) 475-2453. Comments may also be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Meetings of the Commission" in the subject line. The deadline for submission of comments is twenty (20) days from the date of publication of the proposed new rule in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration.

The new rule is proposed pursuant to Property Code, §406 relating to the Commission, and §408.001 which provides general authority for the commission to adopt rules necessary for the implementation of and Title 5, Government Code chapter 551 regarding open meetings.

No other statute, article or code is affected by the proposal.

§300.11. Meetings of the Commission.

(a) The commission shall meet at times and places to be determined either by the chair or the presiding member of the commission.

(b) Meetings of the commission are open to the public unless such meetings are conducted in executive session pursuant to state law.

(c) The chair of the commission shall preside over any proceeding or meeting of the commission, unless a member of the commission is designated by the chair to preside.

(d) Notice of all commission meetings shall be provided in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, as amended, and the Administrative Procedure Act.

(e) A person who wants to testify before the commission about any subject under the commission's jurisdiction shall fill out a Public Comment form prior to the start of the meeting and submit the form to the chair.

(f) The chair will recognize requests to address the commission during the "public comment" portion of a meeting. Public comments will be limited to individuals present in the meeting. No comments will be taken by telephone, internet, video-conferencing or other means of transmission or recording.

(g) The chair may impose a time limit for those wishing to address or make a presentation to the commission. The allotted period for a person addressing the commission may only be extended by commission vote and may not be extended by another person delegating, ceding, passing or otherwise granting allotted comment time in lieu of addressing the commission.

(h) The chair of the meeting has sole discretion to determine the procedural conduct of a commission meeting.

(i) Subsections (e), (f) and (g) do not apply to subcommittee meetings.

(j) Filing deadlines for documents and other materials addressed to the commissioners.

(1) Except as provided in paragraph (2) of this subsection, all documents and other materials addressed to the commissioners relating to any proceeding that has been placed on the agenda of an open meeting shall be filed with the Executive Director or General Counsel no later than five days prior to the open meeting at which the proceeding will be considered provided that no party is prejudiced by the timing of the filing of the documents. Documents that are not filed before the deadline and do not meet one of the exceptions in paragraph (2) of this subsection, will not be considered timely filed, and may not be reviewed by the commissioners in their open meeting.

(2) The deadline established in paragraph (1) of this subsection does not apply if:

(A) The documents or other materials have been specifically requested by one of the commissioners;

(B) The document or other material relates to a matter for which the commission has set a different specific deadline for filing a response; or

(C) Good cause for the late filing exists. Good cause must clearly appear from specific facts shown by written pleading that compliance with the deadline was not reasonably possible and that fail-

ure to meet the deadline was not the result of the negligence of the party. The finding of good cause lies within the discretion of the commission.

(3) Documents or other materials filed under this subsection may be delivered by electronic mail, first class mail, hand-delivery, or by overnight courier delivery.

(4) The person submitting the information in hard copy must provide 16 copies of the materials for distribution to the commissioners and staff. Documents or materials filed under this subsection will be distributed to the commissioners for their consideration unless the requisite number of documents have not been provided.

(5) Written materials filed under this subsection will not be read aloud, and audio or video materials will not be played at the commission meeting, unless the chair otherwise directs at the meeting.

(6) No filing fee is required to file any document or other material with the commission under this subsection.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Durso
General Counsel
Texas Residential Construction Commission
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For further information, please call: (512) 463-2886

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CHAPTER 303. REGISTRATION
SUBCHAPTER A. REGISTRATION OF BUILDERS

10 TAC §§303.1, 303.5, 303.9, 303.13, 303.19

The Texas Residential Construction Commission (the "commission") proposes amendments to §§303.1, 303.5, 303.9, 303.13, and 303.19, relating to the registration of builders in the State of Texas as provided for in Title 16, Property Code. The amendments are proposed to incorporate recent legislative amendments to the agency statute into the rules. In addition, the amendments are proposed as part of an agency rule review plan pursuant to Government Code §2001.39.

Section 303.1, relating to the registration process, expands the information needed on a application due to the amended definition of a builder. Section 303.5, relating to registration of builders, expands builder reporting requirements and adds subsidiaries to the information which must be reported on an application. Section 303.9, relating to eligibility requirements, requires an alien registration applicant to file a copy of a work visa; requires business entities to report judgments, liens and payment plans in default; and requires a change of agent to be reported with in 30 days of disqualification of a registered agent. Section 303.13, relating to a designated address, permits a registrant to use a post office box for receipt of mail only. Section 303.19, relating to renewal, requires builders to completely and truthfully disclose criminal history, financial information, and ownership information; requires builders to renew online if the builder registered 25 or more home in the preceding year; and provides for waivers.

Susan K. Durso, General Counsel, has determined that for each year of the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect the public will benefit from the enhanced registration requirements and clarity of the procedures to regulate registered builders.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no significant impact on individuals or large, small and micro-businesses because of the adoption of the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Interested persons may submit written comments (12 copies) on the proposed amendments to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed sections in the *Texas Register.* Comments received after that date will not be considered. Comments should be organized in a manner consistent with the organization of the proposed amendments. As part of the rule review, the public may include comments on whether the rule is still necessary. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Registration of Builders" in the subject line. Comments submitted electronically to another electronic address or that do not include "Registration of Builders" in the subject line may not be considered.

The amendments are proposed pursuant to Chapter 416, Property Code, which provides for the registration of builders and, generally, pursuant to Property Code §408.001, which provides authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code and Government Code §2001.39, which requires agencies to periodically review their rules.

The statutory provisions affected by these proposed amendments are those set forth in Property Code, Chapters 408 and 416.

No other statutes, articles, or codes are affected by the proposed amendments.

§303.1. Registration Process.

(a) In order to conduct business as a builder in the state of Texas, all [~~All~~] persons must register with the commission before acting as a builder by submitting a Builder/Remodeler Registration Form[~~, in order to conduct business as a builder in the state of Texas~~]. A person must submit a completed registration form and filing fee for issuance of a certificate of registration in the name of each entity under which the applicant intends to operate as a builder in this state. The commission shall issue a certificate of registration to an applicant who meets the eligibility requirements for builder registration within fifteen (15) days of receipt of the completed registration and required fee.

(b) A person who submits a registration form as a new builder must also submit a Builder/Remodeler Affidavit form attesting to whether or not [~~that~~] the person has operated as a builder in the State of

Texas since March 31, 2004. A person who submits a registration form on or after September 1, 2007, must also submit a Builder/Remodeler Affidavit form attesting to whether or not the person has operated as a builder prior to applying for a certificate of registration.

(c) If a person submits a registration form as a new builder, and [has]operated as a builder [after March 31, 2004] without proper registration, the commission may undertake one or more of the following actions as it determines is appropriate:

(1) require the payment of a late fee in addition to the registration fee;

(2) undertake a disciplinary action and impose an administrative penalty;

(3) deny the application; or

(4) institute proceedings seeking injunctive relief or a cease and desist order [refer the matter to the Office of the Attorney General].

(d) If an incomplete application is submitted, the commission will provide the applicant an opportunity to submit complete information. If the applicant fails [Failure] to submit a completed application within fifteen (15) days of the date of notice of a deficiency, [in] the application will be denied and all fees paid will be forfeited [result in the administrative withdrawal of the application].

(e) A denial under this section is final within 30 days unless the applicant files a request for a hearing before the expiration of the 30th day.

§303.5. Registration of Builders.

(a) A builder must identify on the application the legal name and form [type] of business [form] under which the applicant operates, [and] any assumed names [or names] under which it is doing business (dba), and the physical address of the primary office location for each entity.

(b) If the builder has registered [any] assumed namesor other business entities with the Secretary of State's office, the builder must also submit documentation verifying each name registered with Secretary of State and a copy of the Certificate of Assumed Business Name [for each assumed name registered with the Secretary of State].

(c) [(b)] The applicant must identify and provide ownership information on any affiliates and subsidiaries:

(1) that have applied previously for registration with the commission; [or]

(2) that have had an application submitted to the commission [administratively] withdrawn; denied, revoked, or;

(3) that have allowed a certificate of registration with the commission to expire for non-payment of renewal fees.

[(4) An affiliate is an individual or entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the applicant.]

(d) [(c)] The application for registration shall contain a request for information from the applicant that is sufficient for the commission to conduct a financial and criminal background check to determine the applicant's eligibility for registration under the Act.

(e) [(d)] The applicant must disclose on the application for registration:

(1) whether the applicant has entered a plea of guilty, including accepting deferred adjudication, or nolo contendere (no contest) to any felony charge or to any misdemeanor charge when the charge was for a crime involving moral turpitude; or

(2) whether the applicant has been convicted of any felony charge or of a misdemeanor charge for a crime involving moral turpitude and that the time for appeal of the conviction has elapsed or that the conviction was affirmed on appeal.

(f) [(e)] In reviewing an application to determine if an applicant is eligible for registration under this subchapter, the commission shall consider, among other things, whether the applicant has a criminal history and if so:

(1) the nature and seriousness of any crimes to which the applicant has pled guilty or pled no contest, or for which the applicant has a prior conviction or convictions, including whether such a crime involves moral turpitude;

(2) the extent to which acting as a registered builder might offer the applicant an opportunity to engage in further criminal activity of a same or similar nature as that for which the applicant has a prior conviction;

(3) the extent and nature of the applicant's past criminal activity;

(4) the age of the applicant when any criminal activity discovered occurred;

(5) the remoteness in time between the submission of the application and the date of the applicant's last criminal conviction;

(6) the applicant's overall work history in relation to the dates of any criminal convictions;

(7) evidence of the applicant's successful rehabilitation efforts while incarcerated or after release, including but not limited to, restitution to the victim, completion of probationary requirements and completion of community service; and

(8) other evidence of the applicant's eligibility to serve as a registered builder, as requested by the commission.

(g) [(f)] The commission will conduct a criminal background check of each designated agent and may conduct a criminal background check on any other person responsible for the registration if the commission determines it necessary to further the purposes of the Act.

(h) [(g)] Any information obtained from an applicant as a result of the criminal background check that is not a public record at the time the commission obtains the information is deemed confidential. The commission may not release or otherwise disclose the confidential information except pursuant to a court order, subpoena or with the written consent of the applicant.

(i) [(h)] For purposes of this section, an applicant who has received a deferred adjudication for any felony charge or for any misdemeanor charge for a crime involving moral turpitude shall disclose that charge on the application for registration, regardless of whether the applicant has completed the conditions of the order of deferred adjudication.

(j) [(i)] An individual must respond completely and truthfully regarding criminal history and financial information, and disclosure of ownership information on all business entities registered with the commission. Failure to respond completely and truthfully will be considered evidence that the applicant is not honest and trustworthy and does not have integrity, and may result in denial of the application.

(k) [(j)] An applicant must respond timely to any commission request for [further] information in reviewing the completed application in order to complete the application process.

(l) [~~(k)~~] Failure to respond truthfully and completely to requests for information to process a completed application may result in the denial of the application.

§303.9. Eligibility Requirements.

(a) At the time the application for registration is filed with the commission:

(1) individual applicants must be at least 18 years of age and a citizen of the United States or a lawfully admitted alien on a temporary visa that permits the holder to work in the United States and must demonstrate to the satisfaction of the commission that the applicant is honest, trustworthy and has integrity.

(2) individuals who apply as the designated agents of a corporation, limited liability company, partnership, limited partnership, limited liability partnership or other entity must be at least 18 years age and citizen of the United States or a lawfully admitted alien on a temporary visa that permits the holder to work in the United States and must demonstrate to the satisfaction of the commission that the individual is honest, trustworthy and has integrity.

(3) a corporation, limited liability company, partnership, limited partnership, limited liability partnership or other entity must file documentation verifying [~~demonstrate~~] that it is properly registered and in good standing with the Secretary of State and must demonstrate to the satisfaction of the commission that the entity has acted honestly, with trustworthiness and with integrity in its business dealings.

(b) The commission may consider a registered builder's complaint history, history of homeowner-filed requests for participation in the SIRP, compliance with state and federal law, compliance with the commission rules and requests for information, history of unsatisfied judgments and unpaid arbitration awards, history of bankruptcies, compliance history with the Secretary of State regulations and payment of taxes, and history of use of corporate and partnership structures as a means to avoid liability, and outstanding judgments, liens and payment plans in default in evaluating whether an applicant is honest, trustworthy and has integrity.

(c) If the individual applicant is a lawfully admitted alien on a temporary visa that permits the holder to work in the United States, the applicant must also submit a copy of the work visa.

(d) Throughout the period of active registration, an agent must remain eligible to represent the company. Within 30 days of any change to the material information provided on the original application for builder registration, the agent must submit an information update using a commission prescribed form and pay any fees required. If the agent becomes ineligible, an application to replace the designated agent with an eligible agent must be provided. Failure to comply with this rule may result in the revocation or suspension of a certificate of registration.

§303.13. Designated Address.

(a) Each builder shall designate in the application for registration a fixed physical address located in this state to serve as its principal place of business.

(b) Each designated agent shall provide in the application for registration a fixed physical address in Texas.

(c) The commission will use the fixed physical address provided as the mailing address for the registered builder unless the builder elects [~~in order to verify that the address is valid. If the postmaster will not deliver to a physical address for the builder or if delivery to the physical address is not advisable because of theft, and the builder is required to maintain a Post Office Box, the builder may submit a post office box waiver form in order~~] to utilize a Post Office Box address in lieu of a physical address for the receipt of mail only. A designated agent may submit a Post Office Box as a mailing address in addition to the physical address provided pursuant to subsection (b) of this section.

(d) If the builder moves from the physical address or changes the Post Office Box address designated on its certificate of registration, [~~or if the builder has been authorized to utilize a Post Office Box for the receipt of mail,~~] the builder shall submit a change of information form and the required fee not later than thirty (30) days from the date of the address change.

(e) Each designated agent shall submit a change of information form and the required fee not later than thirty (30) days from the date the designated agent moves from the address provided on its application.

§303.19. Renewal.

(a) An individual or business entity [~~After March 1, 2004, a person~~] operating as a builder or remodeler in this state must keep a current certificate of registration and must timely renew its certificate of registration.

(b) The primary designated agent shall timely apply for renewal of the certificate of registration.

(c) [~~(b)~~] A builder or remodeler that has been issued an even-numbered builder registration certificate must renew its registration by the last day of February of each even-numbered year. A builder or remodeler that has been issued an odd-number certificate of registration must renew its registration by February 28 of each odd-numbered year.

(d) [~~(c)~~] A builder or remodeler that [~~who~~] fails to maintain a current certificate of registration may be subject to a late fee, [~~and either~~] an administrative penalty, or other disciplinary action, as determined by the commission.

(e) [~~(d)~~] In order to renew a certificate of registration, a builder or remodeler shall submit a completed application for renewal of a certificate of registration and the required fee to the commission not later than thirty (30) days prior to the end of the applicable registration period as provided in subsection (c) [~~(b)~~] of this section.

(f) A builder or remodeler must respond completely and truthfully regarding criminal history and financial information, and disclosure of ownership information on all business entities registered with the commission. Failure to respond completely and truthfully will be considered evidence that the applicant is not honest and trustworthy and does not have integrity, and may result in denial of the renewal.

(g) All builders and remodelers that file renewal applications with the commission and that have registered more than twenty-five homes in the prior calendar year must file their renewal applications via the commission's secure Web portal provided for online builder/remodeler renewal registration. A completed renewal application and renewal fee must be submitted for each named individual or business entity under which the applicant intends to operate as a builder or remodeler in this state.

(h) Builders and remodelers that are required to use the online renewal process under subsection (e) of this section, but that are unable to utilize the online system may submit a sworn affidavit to the Executive Director requesting a waiver from the required use of the online process for renewal registration.

(i) The Executive Director may grant a waiver requested under subsection (f) of this section, if the builder or remodeler submits a sworn affidavit stating that the builder or remodeler:

(1) does not have the use of a credit card or access to online banking for the purpose of making an online payment;

(2) does not have access to the internet; or

(3) other good cause for waiver as determined in the sole discretion of the Executive Director.

(j) A decision by the Executive Director on whether to grant a waiver under subsection (i)(1) of this section is a final agency decision not subject to further administrative appeal.

(k) A builder or remodeler with a failed-to-timely renew status from a previous renewal year that has been inactive since it failed-to-timely renew must reapply for a certificate of registration under its existing builder registration number accompanied by a notarized affidavit that the company has not acted as a builder since the registration expired.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Durso
General Counsel
Texas Residential Construction Commission
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For further information, please call: (512) 463-2886

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10 TAC §303.10

The Texas Residential Construction Commission ("commission") proposes new rule §303.10 regarding consulting, supervisory, or managerial services that are related to residential construction activities. The new rule establishes a list of 15 factors that the commission will evaluate in determining whether a person who contracts with a homeowner to provide consulting, supervisory, or managerial services related to the construction of a new home or a material improvement to, or interior renovation of, an existing home, is a builder under Title 16 of the Property Code (the Act) and Chapter 303 of the commission's rules or whether the person is acting as a subcontractor or employee assisting a homeowner who is building his own new home or a material improvement or qualified interior renovation to the homeowner's existing home under Property Code §401.005.

The new rule will aid the commission in distinguishing between those persons who provide services to a homeowner that are merely ancillary to building activities conducted by the homeowner and those persons who are, in fact, acting as a builder while also attempting to avoid or evade the builder registration requirements of the Act and the commission's rules. This change will help ensure that persons who are, in fact, acting as a builder will become properly registered with the commission and will properly register those qualified projects for which they are responsible. Persons who offer supervisory, consulting and managerial services related to residential construction activities and who are not properly registered will be subject to disciplinary action within the commission's legal authority.

The 15 factors listed in the new rule include whether the person has direct contact with other subcontractors, vendors, or their employees who perform work for the homeowner related to the construction project; whether the person directs or schedules the work of other subcontractors, vendors, or their employees that is related to the project; and whether the person uses a builder registration number to obtain construction financing for or on behalf of the homeowner. The list of factors in the new rule is not exclusive and allows the commission to consider any other factor that is relevant in making the determination as to whether a person is a builder within the meaning of the Act and Chapter 303 of the commission's rules.

Susan Durso, General Counsel, has determined that for each year of the first five-year period that the new rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed new rule.

Ms. Durso has also determined that for each year of the first five-year period the proposed new rule is in effect the public will benefit from the registration of persons who are, in fact, acting as a builders even though they claim to only be providing services that support homeowners who construct their own homes. This, in turn, will benefit the public by making available to these homeowners and homes the statutory limited warranties and performance standards that apply to the construction performed by registered builders under Title 16 of the Property Code.

Ms. Durso has also determined that for each year of the first five-year period the proposed new rule is in effect there will be no significant effect on individuals or large, small, and micro-businesses as a result of the adoption of the new rule. Persons who are truly acting only as a consultants or advisor to homeowners, and are not acting as a builder as defined by Title 16 of the Property Code, will not be affected by the new rule.

Ms. Durso has also determined that for each year of the first five-year period the proposed new rule is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Interested persons may submit written comments (12 copies) on the proposed new rule to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed new rule in the *Texas Register.* Comments received after that date will not be considered. Comments should be organized in a manner consistent with the organization of the new rule. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "consultant rule" in the subject line. Comments submitted electronically to another electronic address or that do not include "consultant rule" in the subject line may not be considered.

The new rule is proposed under Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property Code, and under Chapter 416 of the Property Code, which requires registration by the commission of persons who act as builders in Texas.

The new rule is proposed to implement Property Code §408.001 and Chapter 416.

No other statutes, articles, or codes are affected by the proposed new rule.

§303.10. Evaluation of Builder's Relationship with the Homeowner.

(a) In determining whether a person who contracts with a homeowner is acting as a builder as that term is defined under the Act, or is merely acting as a subcontractor or employee assisting a homeowner who is constructing his own new home or material improvement or qualified interior renovation to the homeowner's

exiting home, the commission will evaluate the factors listed in this subsection.

(1) whether the person has direct contact with other subcontractors, vendors, or employees of other subcontractors or vendors, who are performing work for the homeowner related to the construction project;

(2) whether the person is present at the job site at the same time as other subcontractors, vendors, or employees of other subcontractors or vendors, who are performing work for the homeowner related to the construction project and, if so, whether the homeowner is also present when the person is present;

(3) whether the person prepared or assisted in the preparation of a total project cost estimate for the homeowner;

(4) whether the person's fee or other compensation is based on the selection of specific subcontractors, vendors, or suppliers, the overall cost of the project, or any loan related to the project or time spent on the project;

(5) whether the person assists the homeowner in the selection or evaluation of subcontractors, vendors, or bids made by subcontractors or vendors;

(6) whether the person reviews the work or invoices of other subcontractors, vendors, or employees of other subcontractors or vendors;

(7) whether the person provides feedback to the homeowner on the work of other subcontractors, vendors, or employees of other subcontractors or vendors;

(8) whether the person directs the work of other subcontractors, vendors, or employees of other subcontractors or vendors;

(9) whether the person schedules the work of other subcontractors, vendors, or employees of other subcontractors or vendors;

(10) whether the person provides any physical labor, equipment or supplies for use by the homeowner in the completion of the construction project;

(11) whether the person pays any subcontractor, vendor, or employee of a subcontractor or vendor for work performed in the completion of the construction project, other than the person's own employees;

(12) whether the person selects or pays for the materials used for the construction project;

(13) whether the person uses its builder registration number or allows the use of its builder registration number to assist in obtaining construction financing for or on behalf of the homeowner;

(14) whether the person uses its builder registration number or allows the use of its builder registration number to assist the homeowner in obtaining a construction permit; and

(15) any other fact that is relevant to determining whether the person is attempting to avoid or evade the registration requirements of the Act or the limited warranty and performance obligations of a builder under the Act, or that demonstrates or tends to demonstrate that the person is, in fact, a builder within the meaning of the Act.

(b) If the commission determines, after notice and hearing, that a person is acting as a builder under the Act, without having properly registered as a builder or without having registered a home for which the person acted as a builder under the Act, the commission will take undertake disciplinary action in accordance with the provisions of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Durso
General Counsel
Texas Residential Construction Commission
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SUBCHAPTER B. REGISTRATION OF HOMES

10 TAC §§303.100, 303.110, 303.120, 303.140, 303.150

The Texas Residential Construction Commission (the "commission") proposes amendments to Title 10, Part 7, Chapter 303, Subchapter B, §§303.100, 303.110, 303.120, 303.140, and 303.150, relating to the registration of homes in the State of Texas as provided for in Title 16, Property Code. The amendments are proposed to incorporate into the rules recent legislative amendments to the agency's statute and agency policy. In addition, the commission is reviewing the necessity of this rule under the requirements of Government Code §2001.39, which requires each state agency to periodically review its rules.

Section 303.100, relating to new home registration, and §303.110, relating to registration of existing homes, requires a home to be registered upon substantial completion, occupancy or issuance of a certificate of occupancy. In addition, §303.110 lowers the threshold for registration of improvements to the interior of an existing home to $10,000.00. Section 303.120, relating to registration for the purposes of the state sponsored inspection resolution process, eliminates a requirement that a homeowner register the home, and now provides that the commission will register the home, and the builder will pay all applicable fees. Amendments to §303.140, relating to the home registration process, provides for online home registration which will streamline and unify home registration, reduce staff time spent on entering data, and reduce errors on data entered as a result of illegible handwriting. The amendments also permit the Executive Director to grant waivers to this requirement, and will require use of the current registration form. Section 303.150, relating to home registration fees, permits assessment of civil penalties against a builder that registers a home more than sixty days past the required deadline.

Susan K. Durso, General Counsel, has determined that for each year of the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect the public and builders will benefit from the expanded home registration dates, immediate registration of all SIRP projects, and clarification on the process to register homes and the applicable late fees. In addition, the public will benefit from reduced costs for processing paper work and uniform procedures for home registration by builders and remodelers.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there

will be no significant impact on individuals or large, small and micro-businesses because of the adoption of the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Interested persons may submit written comments (12 copies) on the proposed amendments to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed sections in the *Texas Register*. Comments received after that date will not be considered. Comments should be organized in a manner consistent with the organization of the proposed amendments. As part of the rule review, the public may include comments on whether the rule is still necessary. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Registration of Homes" in the subject line. Comments submitted electronically to another electronic address or that do not include "Registration of Homes" in the subject line may not be considered.

The amendments are proposed pursuant to Chapter 426, Property Code, which provides for the registration of homes; generally, pursuant to Property Code §408.001, which provides authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code; and Government Code §2001.39.

The statutory provisions affected by these proposed amendments are those set forth in Property Code, Chapters 408 and 426.

No other statutes, articles, or codes are affected by the proposed amendments.

§303.100. New Home Registration.

(a) On or after January 1, 2004, a builder or remodeler shall register with the commission all new home construction [~~resulting from a transaction~~] governed by the Act.

(b) For new home construction involving a title transfer from the builder to the initial homeowner, the builder shall submit a home registration form and the appropriate fee to the commission on or before the 15th day of the month that follows the month in which the title transfer takes place.

(c) For new home construction that does not involve a title transfer from the builder to the initial homeowner, a builder shall register a home by submitting a home registration form and the appropriate fee to the commission not later than the 15th day after the earlier of substantial completion of the home, the date the home is occupied, or the date a certificate of occupancy or a certificate of completion is issued. [~~date that the builder enters into a transaction governed by the Act that is not subject to any contingency or the date of commencement of the work on the home, whichever date is earlier.~~]

§303.110. Registration of Existing Homes by a Builder or Remodeler.

(a) On or after January 1, 2004, a builder or remodeler who enters into a transaction to improve [~~governed by the Act for~~] an existing home shall register the home with the commission.

(b) A builder or remodeler shall register a home under this subsection by submitting a home registration form [~~Home Registration Form~~] and the appropriate fee to the commission not later than the 15th day after the earlier of substantial completion of the residential construction project, the date the home is occupied, or the date a certificate of occupancy or a certificate of completion is issued. [~~date that the builder enters into a transaction governed by the Act that is not subject to a contingency or the date of commencement of the work on the home, whichever date is earlier.~~]

(c) A builder or remodeler shall not intentionally divide an agreement to improve the interior of an existing home into more than one agreement each with consideration of less than $10,000 [~~$20,000~~] for the purpose of avoiding the requirements of this subchapter.

§303.120. Registration for Purposes of SIRP.

A home that is not registered at the time a homeowner [~~A person who~~] files an eligible [~~a~~] request with the commission to initiate the state-sponsored inspection and dispute resolution process for an alleged construction defect(s) will be registered by the commission and the builder or remodeler shall pay the home registration fee [~~resulting from a transaction governed by the Act, must register the home with the commission at the time of filing the request if the home has not been registered previously with the commission~~].

§303.140. Home Registration Process.

(a) A builder or remodeler [~~person~~] registering a home under §303.100 or §303.110 of this subchapter shall submit a completed home registration form in effect at the time the home is registered [~~use the Home Registration Form~~].

(b) A completed home registration form must be submitted to the commission with the appropriate fee [~~by first class mail, personal delivery or~~] via the commission's secure Web portal provided for online home registrations by builders or remodelers, except as provided by subsection (d) of this section.

(c) All builders and remodelers that are registered with the commission and that filed twenty-five or more home registration forms with the commission in the preceding calendar year must register homes online via the commission's secure Web portal for online home registration, unless the builder or remodeler has received a waiver of this requirement under subsection (e) of this section.

(d) Builders and remodelers that are unable to utilize the online home registration process as required by subsection (c) of this section may submit a sworn affidavit to the Executive Director requesting a waiver from the required use of the online process for home registration.

(e) The Executive Director may grant a waiver requested under subsection (d) of this section, if the builder or remodeler submits a sworn affidavit stating that the builder or remodeler:

(1) does not have the use of a credit card or access to online banking for the purpose of making an online payment;

(2) does not have access to the internet; or

(3) other good cause for waiver as determined in the sole discretion of the Executive Director.

(f) If a builder or remodeler is granted a waiver under this section, the home registration form must be submitted to the commission with the appropriate fee by first class mail, fax, or personal delivery.

(g) The Executive Director's decision on whether to grant a waiver under subsection (e) of this section is a final agency decision not subject to further administrative appeal.

(h) The home registration form must state the legal name of the builder or remodeler, as registered with the commission, and the builder registration number assigned by the commission. If the builder registration information on the home registration form does not match com-

mission registration records, the form maybe returned to the builder or remodeler without processing and all fees paid may be forfeited.

(i) If the home registration form is incomplete, the builder or remodeler will be granted 15 days to complete the home registration form. If an appropriate response is not timely received, the home registration application will be denied and all fees paid forfeited.

(j) If a home registration is denied, it is incumbent on the builder or remodeler to register the home appropriately, including paying all late filing fees and civil penalties due. A denial under this subsection constitutes a violation of Property Code §418.001(9) and 10 TAC§303.5(j).

(k) If a home registration is submitted more than 60 days past the deadline for filing the home registration, the commission will assess civil penalties in addition to the home registration filing and late filing fees.

§303.150. Home Registration Fees.

(a) Home registration fees paid under a waiver granted under §303.140 shall be made payable to the Texas Residential Construction Commission via check, money order, credit card or other payment method acceptable to the commission by first class mail, fax, or personal delivery. Online home registration fees must be paid by credit card, debit card or electronic transfer.

(b) A builder or remodeler who fails to register a new home or an existing home construction project with the commission pursuant to the requirements of this subchapter may register the home not later than sixty (60) days after the required registration period has expired by submitting the home registration form with payment of the home registration fee and a late filing home registration penalty in an amount set by the commission.

(c) A builder or remodeler that [~~who~~] has been granted tax-exempt status by the Internal Revenue Service under the Internal Revenue Code §501(c)(3) may request a waiver of a home registration fee by submitting a commission-prescribed fee waiver form and documentation verifying the [~~builder's~~] Internal Revenue Code §501(c)(3) tax-exempt status; however, builders and remodelers that fail to timely register homes and home registration projects under this subchapter are subject to late fees and civil penalties as imposed by the commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. REGISTRATION OF THIRD-PARTY INSPECTORS

10 TAC §303.202

The Texas Residential Construction Commission (the "commission") proposes amendments to §303.202, relating to applications for third-party inspectors as provided for in Title 16, Property Code. The amendments are proposed to incorporate recent legislative amendments to the agency statute. The amendments reflect statutory changes to applicants' experience requirements and the credentials required for applicants on structural and workmanship and materials inspections. In addition, the commission is reviewing the necessity of this rule under the requirements of Government Code §2001.39, which requires each state agency to periodically review its rules.

Susan K. Durso, General Counsel, has determined that for each year of the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect the public and inspectors will benefit the potentially expanded pool of inspector applicants and clarification on the requirements for a combination inspector registration.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no effect on individuals or large, small and micro-businesses because of the adoption of the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Interested persons may submit written comments (12 copies) on the proposed amendments to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed amendments in the *Texas Register.* Comments received after that date will not be considered. Comments should be organized in a manner consistent with the organization of the proposed amendment. As part of the rule review, the public may include comments on whether the rule is still necessary. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Applications for Third-party Inspectors" in the subject line. Comments submitted electronically to another electronic address or that do not include "Applications for Third-party Inspectors" in the subject line may not be considered.

The amendments are proposed pursuant to Chapter 427, Property Code, which provides for the registration of third-party inspectors and, generally, pursuant to Property Code §408.001, which provides authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code.

The statutory provisions affected by these proposed amendments are those set forth in Property Code, Chapters 408 and 427 and Government Code §2001.39.

No other statutes, articles, or codes are affected by the proposed amendments.

§303.202. Application.

(a) An individual applying for registration to serve as a third-party inspector for appointment in the state-sponsored inspection and dispute resolution process must submit a completed application on a commission-prescribed form and the appropriate fee.

(b) An individual may submit an application for registration with the commission to serve as both a workmanship and materials inspector and a structural inspector. An individual seeking to serve as

both a workmanship and materials inspector and a structural inspector must meet the qualifications of each position.

(c) An individual applying for registration as a third-party inspector for issues related to workmanship and materials shall:

(1) provide credible documentation that the individual has acquired a minimum of three (3) [~~five~~] years of experience working in the field of residential construction;

(2) provide documentation that the individual has a current International Code Council (ICC) [~~ICC~~] certification as a residential combination inspector;

(3) attest that the individual has not received more than ten percent of the individual's gross income from providing expert witness services, including retainer fees accepted for the purpose of providing testimony, evidence or consultation in connection with a pending or threatened legal action. For purposes of calculating ten percent of the individual's gross income, the individual should multiply the amount of gross income reported on the last federal income tax return filed by that individual by ten percent. Fees for expert witness services, including providing testimony or evidence in a legal action, received by the individual as a result of having served in the capacity of a registered third-party inspector may be excluded from the amount of gross income when calculating the percentage of gross income received from providing expert witness services under this subsection; and

(4) provide any other information that the commission has deemed necessary to assess the individual's qualifications and fitness to serve as a third-party inspector.

(d) An individual applying for registration as a third-party inspector for issues involving either a structural matter or a structural matter and related workmanship and materials shall:

(1) provide documentation that the individual is a state-licensed professional engineer or a state-licensed architect; and

(2) provide documentation that the individual has acquired a minimum of five (5) [~~ten (10)~~] years of experience working in the field of residential construction;

(3) attest that the individual has not received more than ten percent of the individual's gross income from providing expert witness services, including retainer fees accepted for the purpose of providing testimony, evidence or consultation in connection with a pending or threatened legal action. For purposes of calculating ten percent of the individual's gross income, the individual should multiply the amount of gross income reported on the last federal income tax return filed by that individual by ten percent. Fees for expert witness services, including providing testimony or evidence in a legal action, received by the individual as a result of having served in the capacity of a registered third-party inspector may be excluded from the amount of gross income when calculating the percentage of gross income received for providing expert witness services under this subsection; and

(4) provide any other information that the commission has deemed necessary to assess the individual's qualifications and fitness to serve as a third-party inspector.

(e) A third-party inspector who inspects a issue involving a structural matter and unrelated issue involving workmanship and materials matters must meet the requirements of subsection (d) of this section and provide documentation that the individual has a current ICC certification as a residential combination inspector.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 305. PRACTICE AND PROCEDURES FOR HEARINGS AND DISCIPLINARY ACTIONS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §305.2

The Texas Residential Construction Commission ("commission") proposes amendments to §305.2 regarding definitions. The proposed amendments define new terms added to the Act by House Bill 1038, as enacted by the 80th Texas Legislature: reasonable expenses and fees; repeated failure; and repeated prior violations. The proposed amendment also defines injunctive relief, an existing term that has not been previously addressed.

Susan Durso, General Counsel, has determined that for each year of the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments.

Ms. Durso, has also determined that for each year of the first five-year period the proposed amendments are in effect the public will benefit from having clearer definitions of terms used in the commission's rules.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no effect on individuals or large, small, and micro-businesses as a result of the adoption of the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Interested persons may submit written comments (12 copies) on the proposed amendments to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed amendments in the *Texas Register.* Comments received after that date will not be considered. Comments should be organized in a manner consistent with the organization of the proposed amendments. As part of the rule review, the public may include comments on whether the rule is still necessary. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "305 definitions" in the subject line. Comments submitted electronically to another electronic address or that do not include "305 definitions" in the subject line may not be considered.

The amendments are proposed under Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property

Code, and under Property Code Chapter 419. In addition, the commission is reviewing the necessity of this rule under the requirements of Government Code §2001.39, which requires each state agency to periodically review its rules.

The amendments are proposed to implement Property Code §401.007, §408.001, and Chapter 419 and Government Code §2001.39.

No other statutes, articles, or codes are affected by the proposed amendments.

§305.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--Title 16, Property Code.

(2) Administrative law judge (ALJ)--An individual appointed to preside over administrative hearings pursuant to the APA.

(3) Agency--The divisions, departments and employees of the Texas Residential Construction Commission.

(4) APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001 as amended.

(5) Applicant--A person seeking a registration or certification from the commission.

(6) Attorney of record--A person licensed to practice law in Texas who has provided the commission staff with written notice of representation of a person.

(7) Authorized representative--An attorney of record or any other person who has been designated in writing by a person to represent that person in a proceeding.

(8) Business day--A day on which the commission is open to conduct business.

(9) Certificate of Registration--A document depicting a grant of commission approval, registration or similar form of permission authorized by law.

(10) Commission--The Texas Residential Construction Commission.

(11) Commissioner--One of the members of the commission appointed pursuant to the Act.

(12) Complaint--Pleading filed with the commission alleging a violation of the Act or a commission rule or other matter over which the commission has authority to take disciplinary action.

(13) Contested case--A proceeding, including but not restricted to the denial of registration or certification, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for an administrative hearing.

(14) Continuing violation--Any instance in which the person alleged to have committed a violation attests that a violation has been remedied and subsequent investigation reveals that the violation has not been remedied.

(15) Days--Calendar days, not business days, unless otherwise specified.

(16) Documents--Applications, petitions, complaints, motions, protests, replies, exceptions, answers, notices, or other written instruments filed with the commission in a commission proceeding.

(17) Executive Director--The executive officer of the agency or the authorized designee of that executive officer.

(18) Hearing--Any proceeding in which evidence is taken on the merits of the matters at issue, not including a pre-hearing conference.

(19) Injunctive Relief--A court-ordered requirement to act or prohibition against an act or condition that has been requested, and sometimes granted, in a petition to the court for an injunction.

(20) [~~(19)~~] Party--The commission and each person named or admitted as a party in a contested proceeding before the commission or SOAH.

(21) [~~(20)~~] Person--Any individual, partnership, corporation, association, governmental subdivision, or public, private organization, or other entity however organized.

(22) [~~(21)~~] Pleading--A written document submitted by a party or person seeking to participate as a party, which requests procedural or substantive relief, makes claims, alleges facts, makes legal arguments, or otherwise addresses matters involved in a commission proceeding.

(23) [~~(22)~~] Prehearing Conference--Any conference or meeting of the parties, prior to the hearing on the merits, on the record and presided over by a presiding officer.

(24) [~~(23)~~] Presiding officer--The commission, any commissioner, or administrative law judge presiding over a proceeding.

(25) [~~(24)~~] Probationer--A registrant who is under a commission order of suspension.

(26) [~~(25)~~] Proceeding--Any hearing, including the denial of relief or the dismissal of a complaint, conducted by the commission or SOAH.

(27) Reasonable expenses and fees--Expenses and fees that are fair, just and suitable under the circumstances and that can be justified with documentation including invoices, time sheets, or court costs.

(28) [~~(26)~~] Registrant--Any person to whom the agency has issued a certificate of registration, certification, approval or similar form of permission authorized by law.

(29) [~~(27)~~] Registration--The agency process relating to the granting, denial, renewal, revocation, cancellation, suspension, limitation, reinstatement or re-issuance of a certificate of registration.

(30) Repeated failure--Failure to respond to requests from the commission or failure to perform a duty as required by the Act or the rules two or more times.

(31) Repeated prior violations--Two or more violations of the same or different section(s) of the Act or rules.

(32) [~~(28)~~] Respondent--A person under the commission's jurisdiction against whom any complaint or appeal has been filed or who is under formal investigation by the commission.

(33) [~~(29)~~] Rule--Any agency statement of general applicability that has been formally adopted in accordance with the APA that implements, interprets, or prescribes law or policy, or describes the procedures or practice requirements of this commission. The term includes the amendment or repeal of a prior section but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures.

(34) [~~(30)~~] SOAH--The State Office of Administrative Hearings.

(35) [~~(31)~~] SOAH hearing--A public adjudication proceeding at SOAH.

(36) [~~(32)~~] SOAH rules--1 Texas Administrative Code §§155.1 - 155.59.

(37) [~~(33)~~] Violation--Any activity or conduct prohibited by the Texas Residential Construction Commission Act, commission rule or commission order.

(38) [~~(34)~~] Witness--Any person offering testimony or evidence at a commission or SOAH proceeding.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Durso
General Counsel
Texas Residential Construction Commission
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For further information, please call: (512) 463-2886

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SUBCHAPTER B. DISCIPLINARY PROCEEDINGS

10 TAC §305.21

The Texas Residential Construction Commission proposes amendments to §305.21, regarding the procedures for hearings and disciplinary actions. The proposed amendments eliminate the distinction between formal and informal reprimands and provide for revocation or suspension of a certificate of registration upon a finding that a registrant has had repeated violations that have resulted in disciplinary action or is no longer eligible for registration under §416.005 and §416.006 of the Act. In addition, the commission is reviewing the necessity of this rule under the requirements of Government Code §2001.39, which requires each state agency to periodically review its rules.

The proposed amendments provide for the issuance of a cease and desist order and the imposition of penalties for violating a cease and desist order. In addition, the amendments state the standard criteria to be used in determining administrative penalties related to commission actions.

Ms. Susan Durso, General Counsel for the commission, has determined that for each year of the first five-year period that the proposed amendments are in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Durso has also determined that for the first five years the proposed amendments are in effect the public will benefit from more clear and precise rules that explain how to participate in the disciplinary actions and hearing procedures of the commission. There will not be an effect on individuals, or large, small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Interested persons may submit written comments (12 copies) on the proposed amendments to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711-3509. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed amendments in the *Texas Register.* Comments received after that date will not be considered. Comments should be organized in a manner consistent with the organization of the proposed rule. As part of the rule review, the public may include comments on whether the rule is still necessary. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "305.21 Amendment" in the subject line. Comments submitted electronically to another electronic address or that do not include "305.21 Amendment" in the subject line may not be considered.

The amendments are proposed pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property Code, the commission's enabling act and the Administrative Procedures Act, Texas Government Code Chapter 2001; Property Code §416.005 and §416.006 regarding eligibility requirements for individuals and business entities and Government Code §2001.39.

No other statutes, articles, or codes are affected by the proposed amendments.

§305.21. Commission Actions.

(a) Pursuant to §418.002 and §419.001 of the Act, the commission, upon finding that a person has committed a prohibited act under the Act or violated a commission rule or order, shall enter an order imposing one or more of the following actions:

(1) administer a [~~formal or informal~~] reprimand;

(2) revoke or suspend a person's certificate of registration or certification based on repeated prior violations that have resulted in disciplinary action;

(3) assess an administrative penalty against the person; [~~or~~]

(4) issue a cease and desist order [~~initiate an action~~] to enjoin a person from further action in violation of the Act or commission rule; or [~~.~~]

(5) impose penalties for violation of a cease and desist order.

(b) Before imposing disciplinary action under subsection (a)(2) of this section based on a transaction between a builder and a homeowner, the repeated prior violations must have involved the greater of three homes registered or one percent of the homes registered by the builder during the preceding 12 months.

(c) [~~(b)~~] The commission may stay enforcement of any order and place the person on probation. The commission shall retain the right to vacate the probationary stay and enforce the original order for noncompliance with the terms of the probation or to impose any other disciplinary action as provided in subsection (a) of this section in addition to or instead of enforcing the original order.

(d) [~~(c)~~] The time period of an order shall be extended for any period of time in which a person subject to an order subsequently resides or does business outside the State of Texas or for any period during which the person's registration or certification is subsequently cancelled or expires for nonpayment of registration or certification fees.

(e) Upon finding that a registrant is no longer eligible for a certificate of registration under §416.005 or §416.006 of the Act, the commission shall enter an order to revoke or suspend a person's certificate of registration.

(f) [~~(d)~~] Pursuant to §416.008 of the Act and 10 TAC Chapter 303, Subchapter A, the commission, upon finding that an applicant for registration as builder is unqualified, shall deny the applicant's original or renewal application.

(g) [~~(e)~~] Pursuant to §430.008 of the Act and 10 TAC Chapter 303, Subchapter D, the commission, upon finding that an applicant for registration as a third-party warranty company is unqualified, shall deny the applicant's original or renewal application.

(h) When determining whether to impose an action on a person other than or in addition to the assessment of an administrative penalty under subsection (a) of this section, the commission shall consider:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the prohibited acts;

(2) the history of previous violations;

(3) the amount necessary to deter a future violation;

(4) efforts to correct the violation; and

(5) any other matter justice may require.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Durso
General Counsel
Texas Residential Construction Commission
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For further information, please call: (512) 463-2886

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10 TAC §305.22

The Texas Residential Construction Commission ("commission") proposes an amendment to §305.22, regarding administrative penalties. The proposed amendment increases the maximum penalty amount from $5,000 to $10,000 for each violation of Title 16 of the Property Code or the commission's rules. This change is necessary to implement House Bill 1038, as enacted by the 80th Texas Legislature, which increases the maximum penalty amount in §419.002(a) of the Property Code from $5,000 to $10,000 for each violation of Title 16 of the Property Code or the commission's rules.

The proposed amendment establishes a requirement and procedure for the commission's publication of guidelines regarding sanctions and administrative penalties for a person's first violation of Title 16 of the Property Code or the commission's rules that involves a failure to comply with a filing or payment requirement, or a failure to respond to a commission request for information. This change will help ensure that administrative penalties for such violations are assessed fairly and consistently according to a set of guidelines that the commission will publish. The guidelines will be reviewed annually by the commission in an open meeting and the commission will provide an opportunity for public comment on the guidelines with at least 30 days' notice to the public prior to the meeting in which the guidelines are reviewed.

The proposed amendment also establishes a maximum penalty amount of $1,000 for each day of violation of a cease and desist order issued by the commission. The proposed amendment clarifies that the maximum penalty amount of $5,000 for each violation of Title 16 of the Property Code or the commission's rules does not apply to violations of a cease and desist order issued by the commission. This change is needed because the 80th Texas Legislature added §401.007 to the Property Code, which authorizes the commission to issue a cease and desist order, an order to take affirmative action, or both, to a person who is in violation of Title 16 of the Property Code, and to assess an administrative penalty in an amount not to exceed $1,000 for each day that a violation of a cease and desist order occurs.

The proposed amendment makes three changes in the language of §305.22(a), so that the rule will be applicable to a "person" who commits a violation, and not just a "registrant", as is currently provided, and to clarify the current text of the rule.

Susan Durso, General Counsel, has determined that for each year of the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendment.

Ms. Durso, has also determined that for each year of the first five-year period the proposed amendment is in effect the public will benefit from knowing the amounts that the commission will assess as administrative penalties for first-time violations of filing, payment, or response requirements of Title 16 of the Property Code or the commission's rules.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendment is in effect there will be no significant effect on individuals or large, small, and micro-businesses as a result of the adoption of the proposed amendment.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendment is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Interested persons may submit written comments (12 copies) on the proposed rule to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed amendment in the *Texas Register.* Comments received after that date will not be considered. Comments should be organized in a manner consistent with the organization of the proposed amendment. As part of the rule review, the public may include comments on whether the rule is still necessary. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "penalty rule" in the subject line. Comments submitted electronically to another electronic address or that do not include "penalty rule" in the subject line may not be considered.

The amendment is proposed under Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property Code, and under Chapter 419 of the Property Code, which relates to administrative penalties that may be assessed by the commission. In addition, the amendment is proposed as a part

of an agency rule review plan pursuant to Government Code §2001.39.

The amendment is proposed to implement Property Code §401.007, §408.001, and Chapter 419. In addition, the amendment is proposed as part of an agency rule review plan pursuant to Government Code §2001.39.

No other statutes, articles, or codes are affected by the proposed amendment.

§305.22. Administrative Penalties.

(a) Imposition of a penalty. In a [~~contested case involving~~] disciplinary action, the commission may [~~, as part of the commission's order,~~] impose an administrative penalty against a person [~~registrant~~] who commits a violation or continuing violation.

(b) Amount of penalty.

(1) Each day a violation occurs is a separate violation for which a penalty can be levied, regardless of the status of any administrative procedures that are initiated under this subsection.

(2) The penalty for each separate violation, other than a violation of a cease and desist order, may be in an amount not to exceed $10,000.00 [~~$5,000.00~~].

(3) The penalty for each violation of a cease and desist order may be in an amount not to exceed $1,000 for each day that the violation occurs.

(4) [~~(3)~~] The amount of the penalty shall be based on:

(A) the seriousness of the violation, including the nature, circumstances, extent and gravity of any prohibited acts;

(B) the history of previous violations;

(C) the amount necessary to deter future violations;

(D) efforts to correct the violation; and

(E) any other matter that justice may require, including, but not limited to, the respondent's timely compliance with requests for information, completeness of responses and the manner in which the respondent has cooperated with the commission during the investigation of the alleged violation.

(c) Guidelines.

(1) The commission will publish guidelines regarding sanctions and administrative penalties to impose against a person for the first violation of the Act or an agency rule by a person that consists of a failure to comply with a filing or payment requirement, or a failure to provide information or documents requested by the commission pursuant to a provision of the Act or an agency rule that authorizes such request.

(2) The commission will review the guidelines at least annually at an open meeting and provide an opportunity for public comment on the guidelines with at least 30 days notice prior to the meeting in which the guidelines are reviewed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. DISCIPLINARY PROCEEDINGS

10 TAC §305.28

The Texas Residential Construction Commission proposes amendments to §305.28 and §305.31 of 10 TAC Chapter 305, regarding the procedures for hearings and disciplinary actions. The amendments are proposed to incorporate into the rules recent legislative amendments to the agency's statute and agency policy. Section 305.28 clarifies the application of disciplinary actions. Section 305.31 adds cease and desist orders to notice of hearing requirements. In addition, the amendments are proposed as a part of the agency's rule review plan pursuant to Government Code §2001.39.

Ms. Susan Durso, General Counsel for the commission, has determined that for each year of the first five-year period that the proposed amended rules are in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for state or local government as a result of enforcing or administering the sections.

Ms. Durso has also determined that for the first five years the amended rules are in effect the public and builders will benefit from knowing the availability and applicability of cease and desist orders in the enforcement process.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no effect on individuals or large, small and micro-businesses because of the adoption of the proposed amendments unless they are registered builders and remodelers who face disciplinary action.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Interested persons may submit written comments (12 copies) on the proposed amendments to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed sections in the *Texas Register*. Comments received after that date will not be considered. Comments should be organized in a manner consistent with the organization of the proposed amendment. As part of the rule review, the public may include comments on whether the rule is still necessary. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Disciplinary Actions" in the subject line. Comments submitted electronically to another electronic address or that do not include "Disciplinary Actions" in the subject line may not be considered.

The amendments are proposed pursuant to Chapter 418, Property Code, which provides for disciplinary actions and, generally, pursuant to Property Code §408.001, which provides authority

for the commission to adopt rules necessary for the implementation of Title 16, Property Code.

The statutory provisions affected by these proposed amendments are those set forth in Property Code, Chapters 408 and 418. In addition, the new rule is proposed as part of an agency rule review plan pursuant to Government Code §2001.39.

No other statutes, articles, or codes are affected by the proposed amendments.

§305.28. Referral to the State Office of Administrative Hearings.

(a) If a denied builder or third-party warranty company applicant requests a hearing, the Executive Director shall refer the matter to SOAH as set forth in this chapter.

(b) If the Executive Director believes that a [~~registered~~] person has violated a provision of the Act or a commission rule or order, the Executive Director shall refer the matter to SOAH as set forth in this chapter.

(c) If the Executive Director believes that a person is no longer eligible or qualified to be registered under Chapter 303 of this title, the Executive Director shall refer the matter to SOAH as set forth in this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. PROCEEDINGS AT SOAH

10 TAC §305.31

The amendments are proposed pursuant to Chapter 418, Property Code, which provides for disciplinary actions and, generally, pursuant to Property Code §408.001, which provides authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code.

The statutory provisions affected by these proposed amendments are those set forth in Property Code, Chapters 408 and 418. In addition, the new rule is proposed as part of an agency rule review plan pursuant to Government Code §2001.39.

No other statutes, articles, or codes are affected by the proposed amendments.

§305.31. Notice of SOAH Proceedings.

(a) Notice.

(1) Before revoking or suspending any certificate of registration or certification, [~~or~~] reprimanding any registrant, initiating action for a cease and desist order, or initiating a proceeding for penalties for failure to comply with a cease and desist order or other order prohibiting violations of the Act, the commission will afford all parties an opportunity for an adjudicative hearing after reasonable notice of not less than ten days, except as otherwise provided by commission rule or the Act.

(2) Upon receiving written notice of an appeal of a denial of registration, the commission will make a request for hearing with SOAH within a reasonable time but not later than fifteen business days after receipt of the notice of appeal.

(b) The content of the notice shall be made in accordance with the provisions of §2001.052 of the APA.

(c) Service of notices of hearing shall be made to the parties' last known address submitted to the commission in accord with 10 TAC Chapter 303, Subchapters A, C or D, and 10 TAC Chapter 318, Subchapter B, as applicable, as reflected in the commission's records. Notice mailed to such address by first class mail shall be prima facie evidence of adequate service.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 306. COMPLAINTS

10 TAC §306.1

The Texas Residential Construction Commission ("commission") proposes an amendment to §306.1, relating to the commission's complaint process. The proposed amendment makes it a violation of this section for a respondent to fail to respond to a commission request for a written response or information regarding a complaint within forty-five (45) days after the date that the commission issues its request to the respondent. The proposed amendment also requires the commission to make a final disposition of each complaint that is assigned to an investigator and to notify both the complainant and respondent of its final disposition of the complaint. The amendment is proposed as part of a rule review pursuant to Government Code §2001.39.

The proposed amendment will encourage respondents to provide written responses and information to the commission regarding complaints filed against them and will improve the communication to complainants and respondents regarding the final disposition of complaints that have been assigned to an investigator. The use of the date of issuance, as opposed to the date of receipt, of the commission's request to respondents for written responses and information regarding complaints will help reduce uncertainty as to when the response period begins and ends.

Susan Durso, General Counsel, has determined that for each year of the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed section.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendment is in effect the public will benefit from knowing the status and final disposition of complaints they have filed with the commission that have been assigned to an investigator, and from greater responsiveness by respondents to complaints filed against them by consumers.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendment is in effect there will be no effect on individuals or large, small, and micro-businesses as a result of the adoption of the proposed amendment.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendment is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Interested persons may submit written comments (12 copies) on the proposed amendment to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas, 78711 or by fax to (512) 475-2453. As part of the rule review, the public may include comments on whether the rule is still necessary. Comments may also be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "complaint rule" in the subject line. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed amendment in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the proposed amendment.

The amendment is proposed to implement Property Code §408.001 and §409.003 and Government Code §2005.052(a)(3), which was enacted by the 80th Texas Legislature as part of House Bill 1168 and provides for the denial, suspension, or revocation of a person's license, including a person's registration, for refusing to provide information requested by a licensing authority. In addition, the amendment is proposed as part of an agency rule review plan pursuant to Government Code §2001.39.

No other statutes, articles, or codes are affected by the proposal.

§306.1. Complaint Process.

(a) All complaints shall be submitted in writing, preferably on the commission's Complaint Form, to the Texas Residential Construction Commission, Attn: Complaints, Post Office Box 13509 [~~13144~~], Austin, Texas 78711-3509, by fax to (512) 463-9507, or by email to info@trcc.state.tx.us. The commission's Complaint Form may be obtained by calling the agency toll free at 1-877-651-8722 or from the commission's web site at www.trcc.state.tx.us.

(b) All complaints, whether or not submitted on the commission complaint form, must include the following information in order that the commission may make a preliminary determination as to whether the complaint is within the commission's jurisdiction:

(1) the name and contact information for complainant;

(2) the name and contact information of the party against which the complaint is made;

(3) a description of the basis for the complaint;

(4) the date the information forming the basis of the complaint was discovered;

(5) the names and contact information for any witnesses;

(6) any sources of other pertinent information; and

(7) copies of any documents that support the allegations that form the basis of the complaint.

(c) All complaints, whether or not submitted on the commission complaint form, should include the following information, if known to the complainant and relevant to the complaint:

(1) whether there is a construction contract and if so, the nature of the construction work (new home, remodel) and total contract price;

(2) the start and completion date of the construction; and

(3) if the respondent is a commission registrant, the respondent's registration number.

(d) Upon receipt of a written complaint, the commission will make a preliminary determination as to whether the basis of the complaint is a matter within the commission's jurisdiction. If the complaint information provided is insufficient to make a preliminary determination, the agency will contact the complainant in an effort to develop additional information. If the complainant fails to respond to an information request within 30 days, the commission may close the complaint without prejudice.

(e) If the preliminary determination shows that the commission is the appropriate forum for the subject matter of the complaint, the commission will provide the respondent with a copy of the complaint and request a written response within 45 [~~30~~] days of the date of issuance of the commission's request to the respondent [~~receipt of the letter~~].

(f) It shall be a violation of this section if a respondent fails to respond to a commission request for a written response to, or information regarding, a complaint within 45 days after the date of issuance of the request to the respondent.

(g) [~~(f)~~] If the preliminary determination shows that the complaint is unwarranted or that another entity has authority over the matter, the commission will notify the complainant and respondent of the intent to close the complaint file and if appropriate, the commission will refer the matter to the proper authority.

(h) [~~(g)~~] If a response is received from the respondent, the commission will evaluate the information received and provide a copy of the response to the complainant.

(i) [~~(h)~~] If the facts supplied by the complainant and any response received from the respondent indicate that a further investigation may lead to evidence of a violation of Title 16 of the Property Code or commission rules, the commission will transfer the complaint to an investigator to conduct an investigation.

(j) [~~(i)~~] If an investigation leads to sufficient evidence to support a disciplinary action, the commission will take disciplinary action pursuant to Chapter 418 of the Property Code and commission rules.

(k) [~~(j)~~] The commission shall report quarterly to the complainant and respondent [~~both parties~~] on the status of a complaint until the commission closes the complaint or assigns the complaint to an investigator.

(l) The commission shall make a final disposition of an investigation that originated from a complaint referred to an investigator and the investigator shall notify both the complainant and the respondent of the final disposition of the investigation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Texas Residential Construction Commission
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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 1. LIBRARY DEVELOPMENT
SUBCHAPTER C. MINIMUM STANDARDS FOR ACCREDITATION OF LIBRARIES IN THE STATE LIBRARY SYSTEM

13 TAC §§1.71 - 1.74, 1.77, 1.79, 1.80

The Texas State Library and Archives Commission proposes amendments to 13 TAC §§1.71 - 1.74, 1.77, 1.79, and 1.80, relating to the accreditation of libraries in the Texas Library System.

The proposed amendments to §1.74 and §1.77 remove outdated sections of the rules. The proposed amendments to §§1.71 - 1.74 and §1.77 standardize the language and clarify the intent. The proposed amendments to §§1.72, 1.73, 1.79, and 1.80 add new provisions. The amendments to §1.72 will codify existing practices and specify the level of service to be provided by public school libraries that have a contract with a local nonprofit organization to serve as the community's public library. The amendments to §1.73 add reference to a new statute regarding library districts. The amendments to §1.79 and §1.80 will specify how libraries can regain full membership in the Texas Library System after being on probational or provisional status.

Deborah Littrell, Library Development Division Director, has determined that for the first five years the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended sections.

Ms. Littrell also has determined that for each of the first five years the rules are in effect the public benefits anticipated as a result of enforcing the amendments will be to update the language and clarify the intent and procedures regarding the accreditation of libraries in the state library system. There are no cost implications to either small businesses or persons required to comply with the proposed amended sections.

Written comments on this proposal may be submitted to Deborah Littrell, Director, Library Development Division, Texas State Library and Archives Commission, Box 12927, Austin Texas 78711-2927, or fax (512) 463-8800.

The amendments are proposed under the authority of Government Code §441.123 that directs the commission to establish and develop a state library system, and §441.136 that authorizes the director and librarian to propose rules necessary for the administration of the program.

The proposed amendments affect Government Code §441.123 and §441.136.

§1.71. Definition of Population Served.

For a city, nonprofit corporation, and/or county-established library receiving public monies for public library service, the population served by a public library is the population in the most recent decennial census or official population estimate of the United States Department of Commerce, Bureau of the Census, if available. If a library does not report receiving public monies for public library service, that library will be assigned no population. Calculations will be based upon the following.

(1) In counties with one or more public libraries that receive [~~spend~~] only city and private funds, each library is credited with serving the population of the city or cities from which it receives funds or with which it has a contract.

(2) In counties with only one public library and that library receives [~~spends~~] county funds, the library is credited with serving the entire county population.

(3) In counties with more than one public library that receives [~~spends~~] both city and county funds, the libraries that receive [~~spend~~] city and county funds are credited with serving their city population plus a percentage of the population living outside the cities. This percentage is the ratio of each city's population to the total of all the populations of cities with public libraries within the county.

(4) In counties with a library established by the county commissioners court and that receives [~~spends~~] no city funds or an incorporated library that receives [~~spends~~] no city funds, and one or more city libraries that receive [~~spend~~] county funds, the city libraries that receive [~~spend~~] county and city funds are credited with serving their city populations plus a percentage of the county population living outside the cities. The percentage is the ratio of each city's population to the county population. The county library or incorporated library that receives [~~spends~~] county funds and no city funds serves all county residents not served by a city library.

(5) In counties with one library that receives [~~spends~~] county funds and one or more public libraries that do not receive [~~spend~~] county funds, the library that receives [~~spends~~] county funds is credited with serving the county population less the populations of cities with public libraries.

(6) In counties with more than one library that receives [~~spends~~] county funds and no city funds, the county population living outside cities with public libraries will [~~shall~~] be prorated among the libraries in the same ratio as the county funds are expended.

(7) When school districts contract with one or more nonprofit corporations, cities, or counties for public library services as part of their students' educational program, the State Library will [~~shall~~] estimate the total population living within the school district.

(8) Libraries that enter into agreements or contracts with counties, cities, or school districts to provide public library services will be assigned population under this section whether or not there is an exchange of funds.

(9) In libraries where the population of a federal or state eleemosynary or correctional institution or military installation exceeds 10% of the entire population of the area served by a public library, the residential or base population may [~~shall~~] be subtracted from the population served by that library if these persons are served by an institutional or base library. If the institution or military installation does not have a library that provides general library services, the population will not be subtracted.

(10) When a library believes that the acceptance of county funding would result in the assignment of an unrealistic population figure, it may request in writing that the Library Systems Act Advisory Board approve an exception to the population served methodology. The board will use its discretion to devise a method by which data

from the Bureau of the Census will be used to calculate the assignment of population served.

§1.72. Public Library Service.

(a) Library services must [~~shall~~] be provided without charge or deposit to all persons residing in the local [~~those~~] political subdivisions which provide monetary support to the library. These library services include the dissemination of materials or information by the library to the general public during the hours of operations of all library facilities. In this context, library services include the circulation of any type of materials, reference services (locating and interpreting information), use of computers to access information sources, databases, or other similar services, and admissions to the facility or any programs sponsored or conducted by the library.

(b) The following charges are permitted at the discretion of the library's governing authority: reserving library materials; use of meeting rooms; replacement of lost borrower cards; fines for overdue, lost, or damaged materials in accordance with local library policies; postage; in-depth reference services on a contractual basis; photocopying; personal printing; telefacsimile services; library parking; service to nonresidents; sale of publications; rental and deposits on equipment; and charges for the use of materials and machine-readable data bases not owned by the library, major resource center, or regional library system for which the vendor or supplier has charged a borrowing fee.

(c) Fees may not be charged for library services on the library premises by individuals or organizations other than the library unless the charges are permitted by subsection (b) of this section.

(d) As permitted by §1.73 of this subchapter, relating to Public Library: Legal Establishment, non profit corporations may enter into a contract with a school district to provide library services to the general public residing in the district. This public library service must be in addition to that provided to school students, faculty, and staff. Public library services must be provided at least the required number of hours all weeks of the year, except those weeks with national or state holidays. The number of hours is specified in §1.81 of this subchapter, relating to Quantitative Standards for Accreditation of Library.

§1.73. Public Library: Legal Establishment.

A public library must [~~shall~~] be established to render general library services. The library must be established as:

(1) [~~as~~] a department of a city or county government by charter, resolution, or ordinance; or by contract as provided for in the Government Code, Chapter 791; or

(2) [~~as~~] a library district established under the provisions of Local Government Code, Chapter 326, Library Districts; or

(3) a library district established under the provisions of Local Government Code, Chapter 336, Multi-Jurisdictional Library Districts; or

(4) [~~or as~~] a non profit corporation chartered by the Office of the Secretary of State for the purposes of providing free public library services; these corporations must have a current contract with each funding source (a city, county, or school district) to provide free public library services for the city, county, or school district. [~~, and having a current contract with a city, county, school district, or library district to provide free public library services for the city, county, school district, or library district.~~]

§1.74. Local Operating Expenditures.

A public library must demonstrate local effort on an annual basis by maintaining or increasing local operating expenditures or per capita local operating expenditures. Expenditures for the current reporting year will [~~shall~~] be compared to the average of the total local operating expenditures or to the average of the total per capita local operating expenditures for the three preceding years. Libraries that expend at least $13.50 per capita and at least $125,000 of local funds are exempt from this membership criterion. A public library must [~~shall~~] have minimum total local expenditures of [~~$5,000 in local fiscal years 2004, 2005, 2006;~~] $10,000 in local fiscal years 2007, 2008, 2009; $10,300 in local fiscal years 2010, 2011, 2012; $10,650 in local fiscal years 2013, 2014, 2015.

§1.77. Public Library: Local Government Support.

(a) At least half of the annual local operating expenditures required to meet the minimum level of per capita support for accreditation must be from local government sources. A public library that expends at least $13.50 per capita is exempt from this membership criterion if it shows evidence of some library expenditures from local government sources and is open to citizens under identical conditions without charge. Local government sources are defined as money appropriated by library [~~taxing~~] districts, by school districts, or by city or county governments [~~from their general revenue monies~~].

(b) If a currently accredited library is closed by action of its governing body, the commission, following a public hearing, may revoke that library's current membership in the state library system. This section will not apply if only the library building is temporarily closed because of natural or man-made disasters, or building construction, renovation, or maintenance. The library may be re-accredited as a member in the state library system during the next regular accreditation process, assuming that, by July 31, the library reports data showing that it currently meets all of the appropriate minimum requirements for membership in the state library system (as listed in §1.74 of this subchapter, related to Local Operating Expenditures; §1.75 of this subchapter, related to Nondiscrimination; [~~§1.78 of this subchapter, related to County Librarian's Certificate;~~] §1.81 of this subchapter, related to Quantitative Standards for Accreditation of Library; §1.83 of this subchapter, related to Other Requirements; and §1.84 of this subchapter, related to Professional Librarian).

(c) If a currently accredited library suffers a funding reduction that causes the library to reduce its hours, staffing, or budget below its appropriate minimum requirements for membership in the state library system (as listed in §1.81 of this subchapter, related to Quantitative Standards for Accreditation of Library), the commission, following a public hearing, may revoke that library's current membership in the state library system. The library may be re-accredited as a member in the state library system during the next regular accreditation process, assuming that, by July 31, the library reports data showing that it currently meets all of the appropriate minimum requirements for membership in the state library system (as listed in §1.74 of this subchapter, related to Local Operating Expenditures; §1.75 of this subchapter, related to Nondiscrimination; [~~§1.78 of this subchapter, related to County Librarian's Certificate;~~] §1.81 of this subchapter, related to Quantitative Standards for Accreditation of Library; §1.83 of this subchapter, related to Other Requirements; and §1.84 of this subchapter, related to Professional Librarian).

§1.79. Provisional Accreditation of Library.

(a) A public library that does not meet one of the requirements for accreditation cited in §1.81 of this title (relating to Quantitative Standards for Accreditation of Library) may be provisionally accredited for not more than an initial three-year period, if the library can demonstrate a reasonable expectation of meeting the requirements within three years. At the end of the provisional accreditation, the library must fully meet all the requirements in effect at that time.

(b) A [~~However, a~~] newly established library in a previously unserved county that does not meet two of the requirements for accreditation cited in §1.81 of this title (relating to Quantitative Standards for

Accreditation of Library) may be provisionally accredited, if the library can demonstrate a reasonable expectation of meeting the requirements within three years. At the end of the three years, the library must fully meet all the requirements in effect at that time.

(c) After a library has been provisionally accredited, it must achieve full accreditation before it may be probationally accredited under §1.80 of this title (relating to Probational Accreditation of Library).

§1.80. Probational Accreditation of Library.

A public library that has been fully accredited may be granted probational accreditation for three years if the library fails to meet not more than one of the requirements in §1.81 of this title (relating to Quantitative Standards for Accreditation of Library). To regain full system membership, a library must equal or exceed its previous level of effort on the deficient requirement. At the end of the probational accreditation, the library must fully meet all the requirements in effect at that time. A library may not be probationally accredited for more than three years in a row, for any reason. [~~To achieve full system membership a library must meet the requirements in §1.81 of this title (relating to Quantitative Standards for Accreditation of Library).~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703540
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 463-5459

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 61. COMBATIVE SPORTS

16 TAC §§61.20 - 61.22, 61.40, 61.42, 61.43, 61.47, 61.48, 61.80, 61.105, 61.111, 61.120

The Texas Department of Licensing and Regulation ("Department") proposes amendments to existing rules at Title 16, Texas Administrative Code (TAC), §§61.20 - 61.22, 61.40, 61.42, 61.43, 61.47, 61.48, 61.80, 61.105, 61.111, and 61.120, regarding the Combative Sports program.

These proposed rule changes are necessary to implement changes in law enacted by House Bill 1293, 80th Legislature, and to make appropriate clarifications in the rules for combative sports. The provisions of House Bill 1293 become effective on September 1, 2007 and require the Commission of Licensing and Regulation to adopt rules necessary to implement the new legislation by December 1, 2007. These proposed rule changes were recommended by the Medical Advisory Committee at its meeting on July 27, 2007.

The Department proposes to amend §61.20(a) to add event coordinators to the list of combative sports professionals that must be licensed by the Department.

Section 61.21(b) is amended to reflect that referee licenses will be endorsed to show the class of bouts that the referee may officiate. Subsection (b) is further amended by changing the designations identified in subsection (b)(2) to "K" for kick-boxing and subsection (b)(3) to "M" for mixed martial arts. Subsection (e) is amended to delete a reference to an effective date of the subsection, which has now passed. Subsection (f) is deleted in its entirety to remove the requirement that, in order to obtain or renew a license, referees must provide the Department with the results of a visual acuity test performed by an optometrist or ophthalmologist.

The Department proposes to amend §61.22 by adding a new subsection (b) to require that judges, in order to obtain or renew a license, provide the Department with the results of a visual acuity test performed by an optometrist or ophthalmologist.

The Department proposes to amend §61.40(a)(2) to increase the minimum insurance coverage that is required to be provided by an event promoter so that the coverage required for injuries sustained in an event is $50,000 and for payment in the event of death is $100,000. Further, it is proposed that §61.40(b)(2) be amended by adding a provision that makes the fees paid by a promoter payable 21 days in advance of the events and non-refundable when a promoter has cancelled or postponed two successive events. Subsection 61.40(b)(14) is deleted to remove the requirement that a promoter file its contracts with contestants prior to advertising a championship or title contest. The proposed amendments add new subsection §61.40(b)(16) to require a promoter to supervise its employees and the event coordinators to assure that the events are conducted in compliance with the Department's rules and applicable statutes. Subsection 61.40(b)(17) is added to require a promoter to ensure the adequacy of the advertisements for an event.

The Department proposes to amend §61.42(g) to include eating as an activity in which judges may not engage in during the course of an event.

The Department proposes to amend §61.43(i)(1) to include electrolytes as one of the supplies that are allowed in a contestant's corner during a match. This amendment as proposed will require that a container must be brought to the ring in the manufacturer's sealed container and may only be opened in the presence of a Department representative.

The Department proposes to amend §61.47(a) to allow optometrists to perform ophthalmologic medical examinations in addition to ophthalmologists, as is currently provided, in order to obtain comments and information on the appropriateness of this amendment. This subsection is also to be amended to require that examining physicians, ophthalmologists, or optometrists be licensed in a state, district, or territory of the United States. It is also proposed to amend this subsection so that a contestant with the Hepatitis B virus may prove that they are not acutely or chronically infected with such virus by any medical testing procedure that establishes the absence of Hepatitis B infectivity. New subsection (d) is added to §61.47 to require that contestants report to the weigh-in at the scheduled time. The remaining subsections are re-lettered appropriately.

The Department proposes to amend §61.48(e) to increase the minimum insurance coverage that is required to be provided by an amateur combative sports association (ACSA) so that the coverage required for injuries sustained in an event is $50,000 and for payment in the event of death is $100,000. Subsection 61.48(h)(3) is amended to require that the physicians provided

for an event by an ASCA must be registered by the Department. Since physicians that register with the Department are required to be licensed, this subsection is also amended to delete the requirement that the physician must be licensed.

The Department proposes to amend §61.80(a) to add a new paragraph (11) to provide that the annual fee for event coordinator licensure is $200.

The Department proposes to amend §61.105(d) by adding the punctuation marks "--" between the categories of weigh-in weight differences and the weight difference allowance for such category. Section 61.105 is also amended to include a new subsection (g)(1) through (15) to add weight divisions for boxing and kick boxing. Also, this new subsection allows bouts between contestants of different weight classes so long as the weight differences are within the variances identified in subsection (d).

Section 61.111(h)(2) - (9) is amended to change the word "pounds" to the abbreviation "lbs." to be consistent with other rule sections. The Department proposes to delete §61.111(s)(2) to remove the prohibition on downward punching while the opponent's head is touching the mat. Section 61.111(s)(7) is deleted to remove the prohibition on kicking an opponent while down on the mat. Section 61.111(s)(27) is proposed to be amended to prohibit kicking to the kidney with the heel. These amendments are proposed to make the mixed martial arts contest rules consistent with other jurisdictions that hold these matches. By being consistent with other jurisdictions, it will eliminate confusion that can be created for contestants regarding permissible action during the course of the match which, in turn, can cause hesitation that gives an advantage to an opponent.

The Department proposes to amend §61.120(c). Currently, §61.120(c)(1) through (4) requires that the Medical Advisory Committee include a doctor from each of four designated fields of medical specialization. Due to the continuing difficulty of obtaining volunteers to serve on this committee with these specific specializations, it is proposed to amend this section to require that the Medical Advisory Committee include four medical doctors licensed in Texas.

William H. Kuntz, Jr., Executive Director, has determined that, for the first five-year period the proposed amendments are in effect, there will be some additional costs to the Department in registering and regulating the new category of event coordinators. There will also be some additional costs to the Department due to increased review of provider qualifications in the application and renewal process. These additional costs are not expected to be significant and should be absorbed within existing Department resources. There will also be some additional revenue from the additional fees established in §61.80(a)(11). The Department does not anticipate that the additional revenue will be significant, and the amount should be sufficient to offset additional costs to the state. The Department anticipates that the total number of registered event coordinators will be no more than 20. There will be no cost to local government as a result of enforcing or administering the proposed rules.

Mr. Kuntz also has determined that, for each year of the first five-year period the amendments are in effect, the public will benefit from the additional oversight of event coordinators. Additionally, the public will benefit from the proposed amendments to the rules that provide greater clarity and, therefore, certainty in the administration of the combative sports program.

Mr. Kuntz has determined that there will be some additional costs to persons who are required to comply with the proposed amendments, including small or micro-businesses. Event coordinators, which may be small or micro-businesses, will now be required to pay an initial registration fee of $200 and an annual renewal fee of $200. The amount of any such costs is unknown. Promoters will incur increased costs to purchase insurance that meets the increased coverage amounts. The amount of the increased costs for insurance is expected to be minimal.

Comments on the proposal may be submitted to Caroline J. Jackson, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapters 51 and 2052, which authorize the Department to adopt rules as necessary to implement these chapters. In particular, the amendments are proposed to implement provisions of House Bill 1293, 80th Legislature.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 2052. No other statutes, articles, or codes are affected by the proposal.

§61.20. General Licensing Requirements.

(a) Professional combative sports contestants, promoters, referees, judges, seconds, matchmakers, managers, timekeepers, [~~and~~] ringside physicians, and event coordinators who officiate or participate in a regulated event, other than a regulated amateur event, authorized by the Code must be licensed or registered by the Executive Director.

(b) - (e) (No change.)

§61.21. Licensing Requirements--Referees.

(a) (No change.)

(b) Referee licenses will be endorsed showing each class of bouts in which they may officiate with one or more of the following legends:

(1) B (Boxing);

(2) K [~~KB~~] (Kick-boxing); and

(3) M [~~MMA~~] (Mixed martial arts).

(c) - (d) (No change.)

(e) Referees [~~After February 28, 2007, referees~~] must have an endorsement for a class in order to referee events in that class.

[~~(f) To obtain or renew a license, a referee must provide test results showing visual acuity in each eye of at least 20/40 corrected. The test must have been performed by a licensed Optometrist or licensed Ophthalmologist no more than one year before the application for licensure or license renewal is filed.~~]

§61.22. Licensing Requirements--Judges.

(a) To qualify for a new license as a judge, an applicant must:

(1) be at least 21 years of age;

(2) not have been convicted of a felony; and,

(3) demonstrate the ability to perform the functions of a judge by:

(A) having observed and completed score cards for all contests in at least five events while under the supervision of the De-

partment and scoring the contests in keeping with standards established by the Executive Director; or,

(B) meeting one or more of the following:

(i) having at least three years active experience as a judge and/or referee by having officiated in at least ten combative sporting events per year;

(ii) being currently licensed as a referee in a state that the Executive Director has determined has licensing requirements that are equivalent to Texas' requirements; or

(iii) having formerly held a Texas judge's license that lapsed in good standing.

(b) To obtain or renew a license, a judge must provide test results showing visual acuity in each eye of at least 20/40 corrected. The test must have been performed by a licensed Optometrist or licensed Ophthalmologist no more than one year before the application for licensure or license renewal is filed.

§61.40. Responsibilities of the Promoter.

(a) Bond and Insurance Requirements for Promoters

(1) (No change.)

(2) The promoter shall provide insurance and pay all deductibles for contestants, to cover medical, surgical and hospital care with a minimum limit of $50,000 [~~$20,000~~] for injuries sustained while participating in a contest and $100,000 [~~$50,000~~] to a contestant's estate if he dies of injuries received while participating in a contest. The insurance premium and deductibles shall not be deducted from the contestant's purse. At least ten calendar days before an event the promoter shall provide to the Department for each event sponsored, a certificate of insurance showing proper coverage. The promoter shall supply to those participating in the event the proper information for filing a medical claim.

(b) A Promoter shall:

(1) (No change.)

(2) Provide the Department written notice of all proposed event dates, ticket prices, and participants of the main event, at least 21 days before the proposed event date and obtain written approval from the Department to promote the event prior to advertising or selling tickets. Promoters who have cancelled or postponed two events in sequence after having obtained Departmental approval for the events will be required to pay the permit fee set out in Rule 61.80(b) of this title at the time the 21 day notice is filed. The fee will not be refunded.

(3) - (13) (No change.)

(14) [~~Prior to advertising a championship or title contest, file with the Department the contestants' contracts.~~]

(14) [~~(15)~~] Ensure that the rules set forth below regarding equipment and gloves that apply to a particular type of event are followed and that each event is conducted in compliance with the following:

(A) The ring apron shall be kept clear at all times of objects including, but not limited to: cameras, microphones, and advertisements. A separate camera platform at a neutral corner of the ring for use by cameramen may be provided. Cameramen may be allowed on the ring apron during rest periods, between bouts, or at the discretion of the Executive Director. No seats may be sold at the ring apron.

(B) The Technical Zone shall be set up for the Department, according to the Executive Director's instructions.

(C) All emergency medical personnel and portable medical equipment shall be located within the Technical Zone during the event. There must be a resuscitator, oxygen, stretcher, a certified ambulance, and an emergency medical technician on site for all contests. The Executive Director may require additional medical personnel and equipment depending on the number of matches scheduled.

(D) The judges' chairs shall be high enough that their shoulders shall be no lower than the ring floor. Physician ringside seats shall be in the neutral corner(s).

(E) There shall be at least one, but no more than three, authorized promoter representative(s) at ringside at all times. Only the promoter's representative(s), Department officials, the press, physicians, representatives of sanctioning bodies, and judges shall sit at the ringside tables. For purposes of this rule, an event coordinator is a representative of the promoter.

(15) [~~(16)~~] In the event that a person who is intended to be a Contestant is not licensed at the time of the weigh-in it is the promoter's responsibility to pay the licensing fee by check ,or money order. No cash will be accepted.

(16) Supervise the activities of employees and event coordinators to assure that promoted events are conducted in compliance with these rules and applicable statutes.

(17) Ensure that all advertising concerning an event he promotes accurately describes the event and does not include the names of any person or entity, other than the promoter, as a presenter of the event.

(c) - (e) (No change.)

§61.42. Responsibilities of Judges.

(a) - (f) (No change.)

(g) A judge will at all times during a contest maintain focus on the contest even during rest periods. In order to maintain focus, judges will not engage in distractions including but not limited to: eating, talking, taking photographs, or carrying materials not related to the contest.

§61.43. Responsibilities of Seconds.

(a) - (h) (No change.)

(i) A second shall be responsible for a contestant's corner supplies.

(1) Approved supplies are ice, which must be in an ice bag or Department approved container, water, cotton swabs, gauze pads, clean towels, Adrenalin 1:10,000, Avitene, Thromblin, petroleum jelly or other surgical lubricant, medical diachylon tape, [~~and~~] Enswel, and electrolytes. Electrolytes must be brought to the ring in the manufacturer's sealed container. Electrolytes must be opened for the first time in the presence of a representative of the Department. All coagulants shall be in a container with the proper manufacturer's label and not contaminated by any foreign substance. [~~The use of unapproved substances may result in disciplinary action.~~]

(2) All containers shall be properly labeled with the manufacturer's label and not contaminated by any foreign substance.

(3) The use of an unapproved substance may result in disciplinary action.

(4) Only water and electrolytes shall be permitted for hydration of a contestant between rounds. Honey, glucose, or sugar, or any other substance may not be mixed with the water. [~~Electrolyte solutions are prohibited.~~]

(5) Excessive use of any lubricant on the contestant's body, arms or face is prohibited.

(j) - (k) (No change.)

§61.47. Responsibilities of Contestants.

(a) Medical Examinations. Each contestant applying for a license, or license renewal, shall submit on a department approved form signed by an examining physician and an examining ophthalmologist or optometrist proof of having passed a comprehensive medical examination within thirty days of the date the application is signed by the applicant. Examining physicians, optometrists, and ophthalmologists must be licensed by a state, district or territory of the United States of America. The exam must include an ophthalmologic medical examination completed by an Ophthalmologist or Optometrist [~~only~~] and must indicate that the applicant is free of the Hepatitis C virus and the human immunodeficiency virus (HIV), and that the applicant is not acutely or chronically infected with the Hepatitis B virus by testing the Hepatitis B surface antigen for a non-reactive result, or by other medically acceptable testing procedure that establishes the absence of Hepatitis B infectivity.

(b) A contestant applicant must submit to the Department all information required by the Department's application.

(c) A contestant may not perform under any name that does not appear in departmental records.

(d) Contestants shall report to the weigh in at the scheduled time.

(e) [~~(d)~~] Contestants shall in good faith perform to the best of their abilities.

(f) [~~(e)~~] A contestant who commits a foul under these rules is subject to administrative sanctions and or penalties in addition to losing points during a contest.

(g) [~~(f)~~] Arguing with an official or refusing to obey the orders of an official is prohibited.

(h) [~~(g)~~] Contestants shall compete in proper ring attire. The trunks' waistband shall not extend above the waistline and the hem may not extend more than two inches below the knee. Ring attire may not have sequins, buttons, tassels or any other decorative items that may become detached during a contest. A fitted mouthpiece shall be worn while competing. Shoes shall be of soft material and shall not be fitted with spikes, cleats, or hard heels. Contestants may not participate in any contest while wearing jewelry, including but not limited to, watches, rings, necklaces, bracelets, earrings, any type of stud used to penetrate body piercings.

(i) [~~(h)~~] All contestants shall be in the dressing room at least 45 minutes before the event is scheduled to begin. The contestants shall be ready to enter the ring immediately after the preceding contest is finished.

(j) [~~(i)~~] After receiving final instructions from the referee, contestants may touch gloves or shake hands and then shall retire to their corners.

(k) [~~(j)~~] After the referee or judge's decision has been announced, both contestants and their seconds shall leave the ring when requested to do so by the referee.

(l) [~~(k)~~] Every contestant shall undergo a pre-fight physical examination. If a contestant's physical exam shows him unfit for competition, the contestant shall not participate in the contest. The manager, chief second, or contestant shall make an immediate report of the facts to the promoter and the Department.

(m) [~~(l)~~] If a contestant becomes ill or injured and cannot take part in a contest for which he is under contract, he, his chief second, or his manager shall immediately report the facts to the promoter and the Department. The contestant must submit to the Department medical proof of the injury or illness.

(n) [~~(m)~~] A positive Hepatitis C, or human immunodeficiency virus (HIV) test, or a positive Hepatitis B surface antigen test or other indication of Hepatitis B infectivity will result in disqualification.

(o) [~~(n)~~] The administration or use of any drugs or alcohol during, or up to 24 hours before a contest is prohibited unless a drug is prescribed, administered or authorized by a licensed physician and the Executive Director authorizes the contestant to use the drug. If a contestant is taking prescribed or over the counter medication, he/she must inform the Executive Director of such usage at least 24 hours prior to the contest.

(p) [~~(o)~~] As a condition of licensure, contestants waive right of confidentiality of medical records relating to treatment or diagnosis of any condition that relates to the contestant's ability to participate in a contest. All medical records submitted to the Department are confidential, and shall be used only by the Executive Director or his/her representative for the purpose of ascertaining the contestant's ability to be licensed or participate in a contest.

(q) [~~(p)~~] Medical disqualification of a contestant is for his own safety and may be made at the recommendation of the examining physician or the Department. If a contestant disagrees with a medical disqualification, medical suspension or rest period set at the discretion of a ringside physician or a disqualification set by the Department, he may request a hearing to show proof of fitness. The hearing shall be provided at the earliest opportunity after the Department receives a written request from the contestant or his manager.

(r) [~~(q)~~] The following are gender specific provisions.

(1) Male contestants must wear a protection cup, which shall be firmly adjusted before entering the ring.

(2) Female contestants:

(A) Must wear garments that cover their breasts;

(B) Shall submit to a pregnancy test at weigh-in;

(C) Will be disqualified by a positive pregnancy test; and,

(D) May wear breast protection plates.

(s) [~~(r)~~] Contestants must attend the referee's rules meeting conducted prior to the first contest of an event.

§61.48. Responsibilities of Amateur Combative Sports Associations.

(a) - (d) (No change.)

(e) An ACSA shall provide insurance and pay all deductibles for contestants, to cover medical, surgical and hospital care with a minimum limit of $50,000 [~~$20,000~~] for injuries sustained while participating in a contest and $100,000 [~~$50,000~~] to a contestant's estate if he dies of injuries suffered while participating in a contest. At least ten calendar days before an event the ASCA shall provide to the Department for each event to be conducted, a certificate of insurance showing proper coverage. The ASCA shall supply to those participating in the event the proper information for filing a medical claim.

(f) - (g) (No change.)

(h) An ACSA conducting an event shall:

(1) - (2) (No change.)

(3) Provide two [~~licensed~~] physicians, that are registered by the Department for each event.

(4) - (11) (No change.)

(i) - (j) (No change.)

§61.80. Fees.

(a) The annual fee shall accompany each license or registration application or renewal as follows.

(1) - (10) (No change.)

(11) Event Coordinator--$200

(b) - (c) (No change.)

§61.105. Weight Categories and Weigh-in--Boxing and Kickboxing.

(a) - (c) (No change.)

(d) No contestant may engage in a contest where the weigh-in weight difference between contestants exceeds the allowance shown in the following "WEIGHT ALLOWANCE" schedule:

(1) 112 lbs. or under--3 lbs.

(2) 113-118 lbs.--4 lbs.

(3) 119-126 lbs.--5 lbs.

(4) 127-135 lbs.--6 lbs.

(5) 136-147 lbs.--8 lbs.

(6) 148-160 lbs.--10 lbs.

(7) 161-175 lbs.--12 lbs.

(8) 176-200 [~~190~~] lbs.--15 lbs.

(9) 201 [~~191~~] lbs. or over--No limit

(e) - (f) (No change.)

(g) Weight Divisions. The weight classes for boxing and kickboxing contests or exhibitions are shown in the schedule below. A contestant in a weight class may participate in a bout with a contestant in an adjacent weight class so long as their weight difference falls within the weight allowance shown in subsection (d) of this section above for the weight of the contestant weighing the least.

(1) Flyweight--up to 112 lbs.

(2) Super Flyweight--over 112 to 115 lbs.

(3) Bantamweight--over 115 to 118 lbs.

(4) Super Bantamweight--over 118 to 122 lbs.

(5) Featherweight--over 122 to 126 lbs.

(6) Super Featherweight--over 126 to 130 lbs.

(7) Lightweight--over 130 to 135 lbs.

(8) Super Lightweight--over 135 to 140 lbs.

(9) Welterweight--over 140 to 147 lbs.

(10) Super Welterweight--over 147 to 154 lbs.

(11) Middleweight--over 154 to 160 lbs.

(12) Super Middleweight--over 160 to 168 lbs.

(13) Light Heavyweight--over 168 to 175 lbs.

(14) Cruiserweight--over 175 to 200 lbs.

(15) Heavyweight--over 200 lbs.

§61.111. Mixed Martial Arts.

(a) - (g) (No change.)

(h) Weight Divisions. Except with the approval of the Executive Director, the classes for mixed martial arts contest or exhibitions and the weights for each class are shown in the following schedule:

(1) Flyweight--up to 125 lbs.

(2) Bantamweight--over 125 to 135 lbs. [~~pounds~~]

(3) Featherweight--over 135 to 145 lbs. [~~pounds~~]

(4) Lightweight--over 145 to 155 lbs. [~~pounds~~]

(5) Welterweight--over 155 to 170 lbs. [~~pounds~~]

(6) Middleweight--over 170 to 185 lbs. [~~pounds~~]

(7) Light Heavyweight--over 185 to 205 lbs. [~~pounds~~]

(8) Heavyweight--over 205 to 265 lbs. [~~pounds~~]

(9) Super Heavyweight--over 265 lbs. [~~pounds~~]

(i) - (r) (No change.)

(s) The following tactics are fouls and may result in disqualification or point deduction at the discretion of the referee.

(1) Head butts.

[~~(2) Downward punching while the opponent's head is touching the mat.~~]

(2) [~~(3)~~] Kicks, punches or any strikes to the groin.

(3) [~~(4)~~] Spitting or biting.

(4) [~~(5)~~] Striking or grabbing the throat area.

(5) [~~(6)~~] Grabbing the trachea.

[~~(7) Kicking while the opponent is down on the mat.~~]

(6) [~~(8)~~] Kneeing to the head of a grounded opponent.

(7) [~~(9)~~] Kicking to the head of a grounded opponent.

(8) [~~(10)~~] Hair pulling.

(9) [~~(11)~~] Engaging in any unsportsmanlike conduct that causes an injury to an opponent.

(10) [~~(12)~~] Attacking on the break.

(11) [~~(13)~~] Attacking after the bell has sounded.

(12) [~~(14)~~] Intentionally pushing, shoving, wrestling, or throwing an opponent out of the fight area.

(13) [~~(15)~~] Holding the fence or the ropes.

(14) [~~(16)~~] Using abusive language in the fighting area.

(15) [~~(17)~~] The use of any foreign substances on any contestant's hair, body or equipment.

(16) [~~(18)~~] Eye gouging of any kind.

(17) [~~(19)~~] Fish hooking.

(18) [~~(20)~~] Putting a finger into any orifice or into any cut or laceration on an opponent.

(19) [~~(21)~~] Small joint manipulation.

(20) [~~(22)~~] Striking to the spine or the back or the head.

(21) [~~(23)~~] Striking downward using the point of the elbow.

(22) [~~(24)~~] Clawing, pinching, or twisting the flesh.

(23) [~~(25)~~] Grabbing the clavicle.

(24) [~~(26)~~] Stomping a grounded opponent.

(25) Kicking to the kidney with the heel.

~~[(27) Kidney strikes of any kind.]~~

(26) [~~(28)~~]Spiking an opponent to the canvas on his head or neck.

(27) [~~(29)~~] Holding the shorts or gloves of an opponent.

(28) [~~(30)~~] Flagrantly disregarding the instructions of the referee.

(29) [~~(31)~~] Attacking an opponent who is under the care of the referee.

(30) [~~(32)~~] Timidity, including without limitation, avoiding contact with an opponent, intentionally or consistently dropping the mouthpiece or faking an injury.

(31) [~~(33)~~] Throwing in the towel during competition.

(32) [~~(34)~~] Interference by the corner.

(t) (No change.)

§61.120. Medical Advisory Committee.

(a) The presiding officer of the Texas Commission of Licensing and Regulation, with the approval of the Commission, shall appoint a medical advisory committee to advise the Department concerning health issues for contestants.

(b) The presiding officer of the advisory committee shall be appointed by the presiding officer of the Texas Commission of Licensing and Regulation, with the approval of the Commission.

(c) The Committee shall be composed of seven members:

(1) four members shall be medical doctors licensed by the State of Texas;

~~[(1) one member shall be a trauma specialist;]~~

~~[(2) one member shall be an ophthalmologist;]~~

~~[(3) one member shall be a sports doctor;]~~

~~[(4) one member shall be a neurologist;]~~

(2) [~~(5)~~] one member shall be an emergency medical technician; and

(3) [~~(6)~~] two public members.

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703556
Brian Francis
Deputy Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 463-7348

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PART 8. TEXAS RACING COMMISSION

CHAPTER 303. GENERAL PROVISIONS
SUBCHAPTER D. TEXAS BRED INCENTIVE PROGRAMS
DIVISION 2. PROGRAM FOR HORSES

16 TAC §303.92

The Texas Racing Commission proposes an amendment to 16 TAC §303.92, relating to the Thoroughbred Rules under the Texas Bred Incentive Programs. The current rule provides that Breeder's Awards will be paid only on an accredited Texas-bred Thoroughbred whose dam was accredited with the breed registry prior to foaling the subject horse. The proposed amendment would also allow the payment of Breeder's Awards on an accredited Texas-bred Thoroughbred if the dam is accredited with the breed registry within the same calendar year of foaling the subject horse.

Charla Ann King, Executive Secretary for the Texas Racing Commission, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to encourage participation in the Texas Bred Incentive Programs and contribute to the improved quality of Texas-bred Thoroughbred horses.

There is no anticipated economic cost to an individual required to comply with the proposed amendment.

There are no foreseeable implications relating to costs for small or micro-businesses as a result of enforcing or administering the proposed amendment. Some small or micro-businesses will benefit from the amendment by receiving payment of Breeder's Awards for Thoroughbred horses that would not be eligible under the Texas Bred Incentive Programs under the current rule.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Gloria Giberson, Assistant to the Executive Secretary for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §9.01, which provides that the breed registries' rules establishing qualifications of Texas-bred horses are subject to Commission approval.

The amendment implements Texas Revised Civil Statutes, Article 179e.

§303.92. Thoroughbred Rules.

(a) - (b) (No change.)

(c) Procedure for Payment of Awards.

(1) Conditions precedent for payment of awards are:

(A) (No change.)

(B) Breeder's Awards will be paid only on an accredited Texas-bred Thoroughbred whose dam was accredited with the breed registry either prior to foaling the subject horse or within the same calendar year of foaling the subject horse and is covered by the definition set forth in §1.03(21) of the Act. A horse covered by §1.03(21)(C) of the Act is eligible for only one-half of the incentives awarded pursuant to §6.08(f) and (j) of the Act.

(C) - (F) (No change.)

(2) - (5) (No change.)

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 10, 2007.

TRD-200703529
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 833-6699

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CHAPTER 321. PARI-MUTUEL WAGERING
SUBCHAPTER D. SIMULCAST WAGERING
DIVISION 3. SIMULCASTING AT HORSE RACETRACKS

16 TAC §321.505, §321.509

The Texas Racing Commission proposes amendments to 16 TAC §321.505 and §321.509. Section 321.505 relates to the division among the various breeds of horses of the purse revenue and the Texas Bred Incentive Program funds that are generated from simulcasting. Section 321.509 relates to the distribution of funds in the escrowed purse account to each track and among the various breeds of horses.

The changes to §321.505 identify criteria that the Commission may consider when evaluating an association's proposed division of purse revenue. If the Commission determines that the association's proposal does not accord reasonable access to races for all breeds of horses, the Commission may require the association to submit additional information, require the association to submit a revised recommendation, or substitute its own division of purse revenue. The changes also provide that an association may submit a signed agreement between it and all the recognized representatives of horse owners, trainers and breeders in lieu of the documentation that the association would otherwise have to submit to support its proposal.

The changes to §321.505 also specify the criteria the Commission may consider when determining the percentages by which Texas Bred Incentive Program funds generated from simulcasting are divided. The changes provide that the official horse breed registries may jointly submit a signed agreement regarding the percentages for the Commission's consideration and approval.

The changes to §321.509 identify criteria that the Commission may consider when evaluating an association's proposed division of revenue within the escrowed purse account. If the Commission determines that the association's proposal does not accord reasonable access to races for all breeds of horses, the Commission may require the association to submit additional information, require the association to submit a revised recommendation, or substitute its own division of revenue within the escrowed purse account. The changes also provide that an association may submit a signed agreement between it and all the recognized representatives of horse owners, trainers and breeders in lieu of the documentation that the association would otherwise have to submit to support its proposal.

Charla Ann King, Executive Secretary for the Texas Racing Commission, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be that the criteria for evaluating these revenue divisions will be clearly established and known by all parties.

There is no anticipated economic cost to an individual required to comply with the proposed amendment.

There are no foreseeable implications relating to costs or revenues for small or micro-businesses as a result of enforcing or administering the proposed amendment.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Gloria Giberson, Assistant to the Executive Secretary for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendments are proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendments implement Texas Civil Statutes, Article 179e.

§321.505. Allocation of Purses and Funds for Texas Bred Incentive Programs.

(a) Purses.

(1) An association shall recommend the percentages by which it will divide the purse revenue generated from simulcasting among the various breeds of horses. The percentages are subject to the approval of the Commission.

(2) Before recommending the percentages, the association shall negotiate with [~~receive information from~~] the organizations recognized by the Commission or in the Act as representatives of horse owners, trainers, and/or breeders.

(3) When requesting Commission approval of the percentages, the association shall present studies, statistics, or other documentation supporting the association's application of the criteria in paragraph (4) of this subsection. [~~to support its proposed allocation of funds.~~]

(4) The Commission may consider the following criteria in evaluating whether to approve the association's proposed division of purse revenue:

(A) local public interest in each breed as demonstrated by, but not limited to, the following factors:

(i) live handle by breed;

(ii) simulcast import handle by breed;

(iii) live attendance at the racetracks;

(iv) season seat sales;

(v) group sales activity;

(vi) sponsor interest; and

(vii) market surveys.

(B) earnings generated by the association from each breed;

(C) national public interest in each breed as determined by the live simulcast export handle of each Texas meet;

(D) racetrack race date request and opportunities given to each breed; and

(E) availability of and ability to attract competitive horses.

(5) If the Commission determines that the association's proposed division of purse revenue is inconsistent with the association's obligation to accord reasonable access to races for all breeds of horses, the Commission may:

(A) require the association to submit additional information supporting its recommendation for consideration at the next Commission meeting;

(B) reject the association's recommendation and require the association to submit a new recommendation for consideration at the next Commission meeting; or

(C) reject the association's recommendation and approve an alternate division of purse revenue as determined by the Commission.

(6) In lieu of the process outlined in paragraphs (3) - (5) of this subsection, the association may submit a signed agreement between the association and the organizations referenced in paragraph (2) of this subsection for the Commission to consider for approval. For the Commission to approve the agreement, the agreement must:

(A) delineate the percentages by which the association will divide the purse revenue generated from simulcasting among the various breeds of horses; and

(B) be signed by the association and all organizations referenced in paragraph (2) of this subsection.

(b) Texas Bred Incentive Program Funds.

(1) The Commission shall determine the percentages by which Texas Bred Incentive Program funds generated from simulcasting are divided among the various breeds of horses.

(2) In determining the percentages by which Texas Bred Incentive Program funds generated from simulcasting are divided, the Commission may consider the following criteria:

(A) the amount of participation in live racing by each of the breeds;

(B) the activities of the breed registries to promote their breed for racing and breeding;

(C) the national public interest in each breed as determined by the live simulcast export handle of each Texas meet;

(D) the effect of the proposed allocation on the state's agricultural racing horse breeding industry;

(E) the effect of the proposed allocation on the state's agricultural racing horse training industry;

(F) the amount of Texas Bred Incentive Programs funds from simulcasting generated by each breed.

(3) [~~(2)~~] Before determining the percentages, the Commission shall provide an opportunity for [~~receive information from~~] the official horse breed registries designated in the Act to present information regarding the criteria specified in paragraph (2) of this subsection and any other information that the registries believe may be useful to the Commission. [~~and the associations. In determining the percentages the Commission shall consider the effect of the proposed percentages on the state's agricultural horse breeding and horse training industry.~~]

(4) In lieu of the process outlined in paragraphs (2) and (3) of this subsection, a signed agreement between the organizations referenced in paragraph (3) of this subsection may be submitted to the Commission for consideration and approval. For the Commission to approve the agreement, the agreement must:

(A) delineate the percentages by which the Texas Bred Incentive Program funds generated from simulcasting are divided among the various breeds of horses; and

(B) be signed by all organizations referenced in paragraph (3) of this subsection.

§321.509. Escrowed Purse Account.

(a) At least once a year, the Commission shall distribute all funds accrued in the escrowed purse account created by the Act, §6.091(e). The executive secretary shall establish a deadline for receiving requests for distribution from the account and publicize that deadline to the horse racetrack associations at least 30 days before the deadline. The associations when requesting for distribution from the account shall also recommend the percentages by which it will divide the escrowed purse account revenue among the various breeds of horses.

(b) The Commission shall determine the amount of the distribution to each racetrack in accordance with the standards set forth in the Act, §6.091(e) and (f).

(c) The percentages by which an association will divide the escrowed purse account revenue among the various breeds of horses is subject to the approval of the Commission. When requesting Commission approval of the percentages, the association shall present studies, statistics, or other documentation to support its proposed division of escrowed purse account revenue. The Commission may consider the following criteria when evaluating the association's studies, statistics, or other documentation submitted to support its proposed division of escrowed purse account revenue before granting its approval:

(1) local public interest in each breed as demonstrated by, but not limited to, the following factors:

(A) simulcast import handle by breed;

(B) live handle by breed; and

(C) live attendance.

(2) earnings generated by the association from each breed;

(3) racetrack race date request and opportunities given to each breed;

(4) statewide need by breed; and

(5) national public interest in each breed as determined by the live simulcast export handle of each Texas meet.

(d) If the Commission determines that the association's proposed division of the escrowed purse account revenue is inconsistent with the association's obligation to accord reasonable access to races for all breeds of horses, the Commission may:

(1) require the association to submit additional information supporting its recommendation for consideration at the next Commission meeting;

(2) reject the association's recommendation and require the association to submit a new recommendation for consideration at the next Commission meeting; or

(3) reject the association's recommendation and approve an alternate division of the escrowed purse account revenue as determined by the Commission.

(e) In lieu of the process outlined in subsections (c) and (d) of this section, a signed agreement between the association and the organizations recognized by the Commission or in the Act as representatives of horse owners, trainers, and/or breeders maybe submitted to the Commission for consideration an approval. For the Commission to approve the agreement, the agreement must:

(1) delineate the percentages by which the escrowed purse account revenue received by the association will be divided amongst the various breeds of horses; and

(2) be signed by all organizations recognized by the Commission or in the Act as representatives of horse owners, trainers, and/or breeders.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 10, 2007.

TRD-200703528
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER J. WORK-STUDY STUDENT MENTORSHIP PROGRAM

19 TAC §§4.191 - 4.196

The Texas Higher Education Coordinating Board (Coordinating Board) proposes new §§4.191 - 4.196 concerning Work-Study Student Mentorship Program. Specifically, these new sections are being proposed under the provisions of Texas Education Code, §56.079, added by SB 1050, §2 (80th Texas Legislature) which states, "The Texas Higher Education Coordinating Board shall adopt rules relating to the administration of the work-study student mentorship program under §56.079, Education Code, as amended by the Act, as soon as practicable after the effective date of this Act." The proposed new sections describe the Work-Study Student Mentorship Program. New §§4.191 - 4.196 concerning Work-Study Student Mentorship Program were filed as emergency rules in June 2007.

Dr. Glenda Barron, Associate Commissioner for Participation and Success, has determined that, for each year of the first five years the proposed new sections are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Dr. Barron has also determined that, for each year of the first five years the proposed new sections are in effect, the public benefit anticipated as a result of administering the sections will be the improved access to higher education for high school students.

Comments on the proposal may be submitted to Glenda Barron, P. O. Box 12788, Austin, Texas 78711, (512) 427-6255, Glenda.Barron@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Education Code, §56.079, which authorizes the Coordinating Board to adopt rules concerning the work-study student mentorship program.

The new §§4.191 - 4.196 concerning Work-Study Student Mentorship Program affects Texas Education Code, §56.079.

§4.191. Purpose.

The purpose of this subchapter is to establish rules for implementation of the Work-Study Student Mentorship Program, separate and distinct from the Texas College Work-Study Program outlined under Chapter 22, Subchapter M of this title (relating to Texas College-Work Study Program).

§4.192. Authority.

Texas Education Code, §56.077 authorizes the Coordinating Board to adopt rules to enforce the requirements, conditions, and limitations of §56.079 concerning the Work-Study Mentorship Program.

§4.193. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board or Coordinating Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education.

(3) Financial need--An indication of a student's inability to meet the full cost of attending a college or university, measured by an income methodology, which considers a student to have financial need if his or her adjusted gross annual income is less than income levels set annually by the Commissioner. If the student is a dependent, the family's adjusted gross family income is considered; if the student is independent, only the student's income (and the income of the student's spouse, if he or she is married) are considered.

(4) Mentor--An eligible student employed to:

(A) help students at participating eligible institutions or to help high school students in participating school districts; or

(B) counsel high school students at GO Centers or similar high school-based recruiting centers designed to improve access to higher education.

(5) Participating Entity--An eligible institution, a school district, or a nonprofit organization that has filed a memorandum of understanding with the Coordinating Board under this subchapter.

(6) Program--The Work-Study Student Mentorship Program.

§4.194. Eligibility and Program Requirements.

(a) Eligible Institution. The following Texas institutions of higher education are eligible to participate in the Program:

(1) any public technical college, public junior or community college, public senior college or university, medical or dental unit, or other agency of higher education as defined in Texas Education Code, §61.003; or

(2) a private or independent institution of higher education, as defined by Texas Education Code §61.003(15), other than a private or independent institution of higher education offering only professional or graduate degrees.

(b) Eligible Student Mentors. To be eligible for employment in the Program, a student mentor shall:

(1) be a Texas resident determined in accordance with §§21.727 - 21.736 of this title (relating to Determining Residence Status);

(2) be enrolled for at least one-half of a full course load in a program of study;

(3) establish financial need as set forth under §4.193 of this subchapter; and

(4) not receive an athletic scholarship or not be enrolled in a seminary or other program leading to ordination or licensure to preach for a religious sect or to be a member of a religious order; and

(5) receive appropriate training as determined by the Commissioner or Coordinating Board staff.

(c) Participating Entities. To participate in the Program, an eligible institution and one or more school districts or nonprofit organizations shall file with the Coordinating Board a memorandum of understanding detailing the roles and responsibilities of each participating entity.

(d) Criteria for Participation and Program Requirements. Additional criteria for participation and program requirements shall be determined in consultation with participating entities and set forth in Commissioner's policies. The Commissioner's policies shall be reviewed periodically to determine the effectiveness and success of the Program.

§4.195. Allocations and Disbursement of Funds.

(a) Allocations. The Board shall allocate Program funds to participating institutions according to criteria established by the Commissioner. At the beginning of each academic year, the year's full allocation will be provided to each participating institution.

(b) Reallocations. Institutions shall have until a date specified by the Commissioner to encumber all funds allocated. On that date, institutions lose claim to unencumbered funds and the unencumbered funds are available to the Commissioner for reallocation to other institutions. If necessary for ensuring the full use of funds, subsequent reallocations may be scheduled until all funds are awarded and disbursed.

(c) Program funds may be used during any academic period for which mentorship opportunities are needed by participating entities as long as student mentors meet eligibility requirements as outlined under §4.194(b).

§4.196. Reporting.

(a) Not later than November 1 of each year, each institution participating in the Program shall report to the Coordinating Board on the progress made by students being assisted through the Program. The report shall include:

(1) the number of students employed as mentors in the preceding year;

(2) the number of students from the participating institution receiving mentoring in the preceding year;

(3) the number of high school students receiving mentoring or counseling from students of the participating institution in the preceding year;

(4) information relating to the costs of the program; and

(5) the academic progress made by student mentors, students of the participating institution receiving mentoring, and high school students receiving mentoring or counseling from students of the participating institution in the preceding year.

(b) The Coordinating Board shall establish reporting requirements and forms to be completed by participating institutions in the Program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007, 2007.

TRD-200703557
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 25, 2007
For further information, please call: (512) 427-6114

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CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES AND/OR HEALTH-RELATED INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §5.5

The Texas Higher Education Coordinating Board proposes amendments to §5.5 concerning the uniform admission policy. The amendment was adopted on an emergency basis at the July 2007 Coordinating Board meeting pursuant to §2001.034 of the Government Code, which allows a state agency to adopt an emergency rule if a requirement of state or federal law requires adoption of the rule on less than 30 days notice. Specifically the section is required to permit institutions of higher education that may be uncertain how to apply H.B. 3826, enacted by the

80th Legislature, a two-year period in which they may continue to admit students who have not taken the recommended high school program.

Mr. William Franz, General Counsel, has determined that for each year of the five years the section is in effect, there will not be any fiscal implications for state and local government as a result of administering the rule.

Mr. Franz has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section is a reduction of the uncertainty for institutions of higher education as to the standards for admission. There is no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to James Tourtelott, Assistant General Counsel, P.O. Box 12788, Austin, Texas 78711, or james.tourtelott@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code §51.807 which authorizes the Coordinating Board to adopt rules concerning the uniform admission policy.

The amendment affects the Texas Education Code, §51.084 and §51.085.

§5.5. Uniform Admission Policy.

(a) - (f) (No change.)

(g) In exercising its discretion in accordance with Texas Education Code, §51.804, whether to adopt an admissions policy for each academic year for first-time freshman students, the governing board of each general academic teaching institution may elect to admit students who do not meet the requirements of Texas Education Code, §51.803, but who qualify for admission under one or more of the factors listed in Texas Education Code, §51.805(b). However, the total number of such students who are admitted in an academic year may not exceed 20% of the total number of first-time freshman students admitted by the institution for that academic year. This subsection expires August 31, 2009.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703558
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 25, 2007
For further information, please call: (512) 427-6114

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SUBCHAPTER F. MATH, SCIENCE, AND TECHNOLOGY TEACHER PREPARATION ACADEMIES

19 TAC §§5.111 - 5.115

The Texas Higher Education Coordinating Board proposes new §§5.111 - 5.115 concerning math, science, and technology teacher preparation academies. Specifically, these new sections will set forth requirements for implementation of mathematics, science, and technology teacher preparation academies.

Dr. Glenda O. Barron, Associate Commissioner for Participation and Success, has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Dr. Barron has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the improvement of instructional skills of teachers and students enrolled in teacher preparation programs to perform at the highest levels in mathematics, science, and technology. There is no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Glenda O. Barron, Associate Commissioner of Participation and Success, at P.O. Box 12788, Austin, Texas 78711, or Glenda.Barron@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Education Code, §21.462, which provides the Coordinating Board with the authority to adopt rules to establish mathematics, science, and technology teacher preparation academies.

The new sections affect Texas Education Code, §21.462.

§5.111. Purpose.

The purpose of this subchapter is to set forth requirements for implementation of mathematics, science, and technology teacher preparation academies.

§5.112. Authority.

Texas Education Code, §21.462 authorizes the Coordinating Board to adopt rules to establish mathematics, science, and technology teacher preparation academies at institutions of higher education that have a State Board for Educator Certification approved teacher preparation program or are affiliated with a program approved by the Board.

§5.113. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board or Coordinating Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education.

(3) Eligible Institution or Institution--A Texas institution of higher education as defined in Texas Education Code, §61.003, that either the State Board for Educator Certification approved teacher preparation program, or is affiliated with a teacher preparation program approved by the Coordinating Board.

(4) Eligible Teacher--An experienced teacher that meets the requirements set forth under Texas Education Code, §21.462(d), and meets other requirements determined by the Commissioner.

(5) State Board for Educator Certification or SBEC--The entity with authority to oversee all aspects of the preparation, certification, and standards of conduct of Texas public school educators.

(6) Mathematics, Science, and Technology Teacher Preparation Academy or Academy--A program approved by the Coordinating Board to be offered at select institutions of higher education to improve the instructional skills of teachers certified under Texas Education Code, Chapter 21, Subchapter B, and train students enrolled in teacher preparation programs to perform at the highest levels in mathematics, science, and technology.

§5.114. Institutional Eligibility.

Under a competitive process, an eligible institution or institutions shall be selected by the Board to establish an Academy or Academies under procedures outlined by the Commissioner and in accordance with Texas Education Code, §21.462.

§5.115. Funding.

(a) The amount and use of funding awarded to each institution approved by the Board to offer an Academy or Academies shall be determined by the Commissioner.

(b) The funds shall be distributed to each institution approved by the Board to offer an Academy or Academies in a manner and time to be prescribed by the Commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 25, 2007
For further information, please call: (512) 427-6114

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CHAPTER 6. HEALTH EDUCATION, TRAINING, AND RESEARCH FUNDS
SUBCHAPTER D. TEXAS HOSPITAL-BASED NURSING EDUCATION GRANT PROGRAM

19 TAC §§6.81 - 6.83

The Texas Higher Education Coordinating Board proposes new §§6.81 - 6.83, concerning the Board's criteria and process for awarding grants under the Texas Hospital-based Nursing Education Partnership Grant Program. The proposed sections provides information on the application process, methodology and criteria for awarding grants and making funding decisions, and the terms and conditions of the grant agreements.

Dr. Joseph H. Stafford, Assistant Commissioner for Academic Affairs and Research, has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implications to state or local government as a result of this proposed rule.

Dr. Stafford has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the section would be in initiating new nursing degree programs, thus helping to relieve the state's nursing shortage. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Joseph H. Stafford, Assistant Commissioner for Academic Affairs and Research, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or joe.stafford@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Education Code, §61.9756 which provides the Coordinating Board with the authority to establish rules for the grant programs.

The new sections affect the Texas Education Code, §§61.9751 - 61.9759.

§6.81. Purpose and Authority.

The purpose of this subchapter is to describe the Board's criteria and process for awarding grants under Texas Hospital-based Nursing Education Partnership Grant Program. The Board is authorized to establish rules for this grant program under Texas Education Code §§61.9751 - 61.9759.

§6.82. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education.

(3) Hospital--a health care facility that provides in-patient services in the state, that is in good standing with all regulators and accreditation bodies, and that is not owned, maintained, or operated by the federal or state government or an agency of the federal or state government.

(4) Nursing school--an educational entity of a Texas public or independent institution of higher education that offers a degree program that prepares students for initial licensure as registered nurses and that has initial or full approval status from the Texas Board of Nursing on the date that grant applications are due to the Board.

(5) Hospital-based nursing education partnership--one or more hospitals as defined in paragraph (3) of this subsection and one or more nursing schools as defined in paragraph (4) of this subsection which serve to increase the number of students enrolled in and graduating from one or more degree programs as a result of a partnership.

(6) Degree program--Courses and learning experiences leading to

(A) an associate degree in nursing

(B) a baccalaureate degree in nursing, leading to initial licensure as a registered nurse

(C) a master's degree in nursing with a concentration in nursing education

(D) an academic program designed to advance a registered nurse from an associate degree to a bachelor of science degree in nursing or to a master of science degree in nursing with a concentration in nursing education.

§6.83. Texas Hospital-based Nursing Education Grant Program.

(a) General Information. The program, as it applies to this section:

(1) Purpose--To provide funding to eligible hospitals in partnership with one or more nursing schools to establish or pilot

innovative degree programs which serve to increase the number of students enrolled in and graduating from degree programs.

(2) Authority--Texas Education Code, §§61.9751 - 61.9759

(3) Eligible degree program--Degree programs offered through hospital-based nursing education partnerships which:

(A) use existing expertise and facilities of the partners

(B) meet applicable Board and Texas Board of Nursing standards for instruction and student competency, or receive approval from the Board and the Texas Board of Nursing to waive those standards as a pilot project. The application for approval of a pilot project will be contained in the Request for Proposal;

(C) require each nursing school participating in the partnership, as a result of the partnership, to enroll in the degree program a sufficient number of additional students as specified in the Request for Proposal;

(D) provides comparable marginal costs to the state of producing a graduate from a nursing school that is participating in partnership with the marginal costs to the state of producing a graduate from a nursing school not participating in a partnership. The range of acceptable marginal costs will be calculated by the Board and contained in the Request for Proposal. Criteria used to determine marginal costs are based on the appropriate formula funding calculation for nursing increased by a factor to adjust to the full reported costs of a representative sample of the nursing schools.

(E) provides students with appropriate clinical placements to fulfill licensing and academic requirements of the degree.

(4) Application requirements--Applications shall be submitted to the Board in the format and at the time specified by the Board.

(5) General Selection Criteria--Competitive. Designed to award grants that provide the best overall value to the state. Selection criteria shall be based on:

(A) Program quality as determined by peer reviewers;

(B) Impact the grant award shall have on academic instruction and training in nursing education in the state;

(C) Cost of the proposed program; and

(D) Other factors to be considered by the Board, including financial ability to perform program, state and regional needs and priorities, ability to continue program after grant period, and past performance.

(6) Minimum award--$50,000 per award in any fiscal year.

(7) Maximum award--30 percent of the estimated available funding per award in any fiscal year.

(8) Maximum award length--A program is eligible to receive funding for up to three years, contingent upon available funds and a positive evaluation of the progress and effectiveness of the program after the first and second years of funding.

(b) Peer Review.

(1) The Board shall use peer reviewers to evaluate the quality of applications.

(2) The Commissioner shall select qualified individuals to serve as reviewers. Peer reviewers shall demonstrate appropriate credentials to evaluate grant applications in nursing education. Reviewers shall not evaluate any applications for which they have a conflict of interest.

(3) The Board staff shall provide written instructions and training for peer reviewers.

(4) The peer reviewers shall score each application according to these award criteria:

(A) Originality

(B) Potential replication

(C) Partnership design

(D) Degree program design

(E) Student services

(F) Matching funds

(G) Cost effectiveness

(H) Evaluation and expected outcomes

(I) Sustainability of program

(c) Application Review Process.

(1) The Board staff shall review applications to determine if they adhere to the grant program requirements and the funding priorities contained in the Request for Proposal. An application must meet the requirements of the Request for Proposal and be submitted with proper authorization before or on the day specified by the Board to qualify for further consideration. Qualified applications shall be forwarded to the peer reviewers for evaluation. Board staff shall notify applicants eliminated through the screening process within 30 days of the submission deadline.

(2) Peer reviewers shall evaluate applications and assign scores based on award criteria. All evaluations and scores of the reviewers are final.

(3) Board staff shall rank each application based on points assigned by peer reviewers, and then may request that individuals representing the most highly-ranked applications make oral presentations on their applications to the peer reviewers and Board staff. The Board staff may consider reviewer comments from the oral presentations in recommending a priority ranked list of applications to the Commissioner for approval.

(d) Funding Decisions.

(1) Applications for grant funding shall be evaluated only upon the information provided in the written application.

(2) The Board will approve grants upon the recommendation of peer reviewers and Board staff.

(3) Funding recommendations to the Commissioner shall consist of the most highly ranked and recommended applications up to the limit of available funds. If available funds are insufficient to fund a proposal after the higher-ranking and recommended applications have been funded, staff shall negotiate with the applicant to determine if a lesser amount would be acceptable. If the applicant does not agree to the lesser amount, the staff shall negotiate with the next applicant on the list of highly ranked applications.

(4) If the Board does not use all of the available funds for the program, unspent funds may be used to make grants under the Professional Nursing Shortage Reduction Program and the Nursing, Allied Health, and Other-Health-related Education Grant Program.

(e) Contract. Following approval of grant awards by the Commissioner, the successful applicants must sign a contract issued by Board staff and based on the information contained in the application.

(f) Cancellation or Suspension of Grants. The Board has the right to reject all applications and cancel a grant solicitation at any point before a contract is signed.

(g) Request for Proposal. The full text of the administrative regulations, budget guidelines, reporting requirements, and other standards of accountability for this program are contained in the official Request for Proposal available upon request from the Board.

(h) Grants, Gifts, and Donations. The Board may solicit, receive, and spend grants, gifts, and donations from any public or private source for the purpose of this subchapter.

(i) Administrative Costs. Three percent of any money appropriated for purposes of this subchapter may be used to pay the costs of administering the program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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CHAPTER 13. FINANCIAL PLANNING
SUBCHAPTER L. ENGINEERING RECRUITMENT SUMMER CAMPS

19 TAC §§13.200 -13.202

The Texas Higher Education Coordinating Board proposes new §§13.200 - 13.202 concerning engineering recruitment summer camps, established by the Texas Higher Education Coordinating Board. The rules were first adopted on an emergency basis as Subchapter Q, §§22.312 - 22.315 at the Coordinating Board's July 19, 2007 meeting, under the provisions of House Bill 2978 of the 80th Texas Legislature. Section 2 of this act authorized the Board to adopt rules in the manner provided by law for emergency rules to start the programs beginning with the 2007-2008 academic year. Since staff separated the administration of the scholarship part (Student Services) from that of the summer camp part (Academic Affairs and Research), staff recommends dividing the emergency rules into two separate sets of rules as well. Rules for the scholarships will remain in Subchapter Q of Chapter 22 and rules for the summer camps will be in a new Subchapter L of Chapter 13. These new sections will establish requirements for admission to a summer camp program for middle and high school students, reflecting the demographics of the state, at engineering degree programs of general academic teaching institutions. The Coordinating Board estimates that a one week summer camp with 20 participants costs on average $10,000 to execute. Some institutions will want to hold four to six sessions. Some institutions will want to hold only one session, based on demand from high school students. If the average number of sessions is two, the program would cost an estimated $380,000 per summer. The Coordinating Board is planning, after consultation with the bill's sponsor Representative Morrison, to use $200,000 of the appropriation for the current biennium ($1,000,000 per fiscal year) for the summer camp program.

Dr. Joseph H. Stafford, Assistant Commissioner for Academic Affairs and Research, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of this proposed rule.

Mr. Stafford, has also determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of administering the section will be that children need to be encouraged to enroll in more math and science related classes in order to remain competitive on a national and global level in those fields of study. Currently, Texas lags behind most of its key competitor states in the number of engineering and computer science degrees awarded to graduating students, ranking ninth of among the 10 most populous states in the number of degrees awarded per 1,000 students in science and engineering fields. Summer camps for secondary school students are currently a favorite tool to gain interest of these students because they allow students to overcome prevalent misconceptions of engineering and are an effective tool to demonstrate that young people have the ability to succeed, especially in mastering the required mathematics. Summer camps also form cohorts of peers who may, if the camps are done correctly, stay in touch till commencement of studies. Summer camps leverage student interest with community interest through TV and print media reporting, etc. And finally, summer camp students go back to their schools having an impact on peers, teachers, and counselors.

Comments on the proposal may be submitted to Joe Stafford, Assistant Commissioner for Academic Affairs and Research, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or joe.stafford@thecb.state.tx.us Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are proposed under Texas Education Code, §61.027, which provides the Coordinating Board with general rule-making authority, §61.002, which establishes the Coordinating Board as an agency charged to provide leadership and coordination for the Texas higher education system, and Texas Education Code, §§61.791 - 61.793, which authorized the Coordinating Board to adopt rules concerning engineering recruitment programs established by the Texas Higher Education Coordinating Board.

The new sections affect Texas Education Code, §61.002.

§13.200. Authority, Scope, and Purpose.

(a) Authority. Authority for this subchapter is provided in the Texas Education Code, Subchapter Q, ENGINEERING RECRUITMENT PROGRAMS. This subchapter establishes rules for administering the engineering recruitment summer camps as prescribed in the Texas Education Code, §§61.791 - 61.793.

(b) Scope. Unless otherwise noted, this subchapter applies to any general academic teaching institution (Texas Education Code, §61.003) that offers an engineering degree program and their students.

(c) Purpose. The purpose of these programs is to provide grants to any general academic teaching institution to implement one-week summer camps for middle and high school students at any general academic teaching institution.

§13.201. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board--the Texas Higher Education Coordinating Board.

(2) Commissioner--the Commissioner of Higher Education.

(3) Eligible institution--any general academic teaching institution that offers one or several undergraduate degree programs in engineering.

(4) Engineering degree program--any undergraduate degree program in engineering at an eligible institution.

(5) Summer camp--a math, science, and engineering laboratory-oriented day camp, organized by an eligible institution with one or more one-week sessions, to take place on the campus of the eligible institution.

(6) Proposal--a summer camp proposal written by an eligible institution.

§13.202. Summer Camps.

(a) Summer camps shall be designed for middle and/or high school students that will introduce participating students to math, science, and engineering concepts that they may encounter in an engineering degree program.

(b) Once every fiscal year the Commissioner may authorize distribution of a request for proposals for the design and implementation of summer camps.

(c) The Board shall post the request for proposals on the agency website at least 30 working days prior to the due date for proposals and shall notify all eligible institutions.

(d) The request for proposals shall:

(1) contain information necessary to prepare proposals including financial resources available for distribution as well as the criteria that will be used for award of grants,

(2) contain data describing the demographics of the state,

(3) require the proposal to address plans by the eligible institution to ensure that its summer camp reflects the demographics of the state,

(4) include the requirements for admission to a summer camp, including the requirement of an appropriate math and science background according to the participating student's grade level and the availability of camp scholarships if needed, and

(5) specify any other grant conditions.

(e) Each eligible institution may submit one proposal to the Board and the Commissioner shall award grants for the summer camps based on submitted proposals and availability of funding.

(f) All eligible institutions receiving grants for summer camps shall submit a final report to the Board within 90 days of the end of the summer camp. The Commissioner shall specify the format for the report.

(g) After making a finding that an eligible institution has failed to perform or failed to conform to grant conditions, the Commissioner may retract or reduce the grant for the summer camp.

(h) The governing board of each eligible institution shall cooperate with the board in administering this program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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CHAPTER 21. STUDENT SERVICES
SUBCHAPTER X. DETERMINATION OF RESIDENT STATUS AND WAIVER PROGRAMS FOR CERTAIN NONRESIDENT PERSONS

19 TAC §21.730

The Texas Higher Education Coordinating Board proposes an amendment to §21.730 concerning the Determination of Resident Status and Waiver Programs for Certain Nonresident Persons. Specifically, the amendment to §21.730 reflects a new path to residency established through the passage of House Bill 3826 by the 80th Texas Legislature, which indicates a person who graduates from a high school operated by the United States Department of Defense with a grade point average in the top 10 percent of the person's high school graduating class in one of the two school years preceding the academic year for which he or she is applying for admission is a Texas resident.

Ms. Lois Hollis, Assistant Commissioner for Student Services, has estimated that for each year of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of administering the section will be that certain children of military families will attend Texas public institutions while paying the resident tuition rate. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P. O. Box 12788, Austin, Texas 78711, (512) 427-6465, Lois.Hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is adopted under the Texas Education Code, §51.807 which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, Chapter 51, Subchapter U.

The amendment affects Texas Education Code, §§51.801 - 51.809.

§21.730. Determination of Resident Status.

(a) The following persons shall be classified as Texas residents and entitled to pay resident tuition at all institutions of higher education:

(1) - (3) (No change.)

(4) a person who graduated from a high school operated by the United States Department of Defense with a grade point average in the top 10 percent of the person's high school graduating class in one

of the two school years preceding the academic year for which he or she is applying for admission.

(b) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER CC. EARLY HIGH SCHOOL GRADUATION SCHOLARSHIP PROGRAM

19 TAC §21.951

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §21.951 concerning the Early High School Graduation Scholarship Program. Specifically, proposed amendments to §21.951 provide a definition for the term "to graduate" as the process of completing the academic requirements for graduation from high school. This definition more clearly applies to student eligibility requirements than did the previous definition of "high school graduate"--a person who has completed requirements for graduation.

Ms. Lois Hollis, Assistant Commissioner for Student Services, has estimated that, for the first year of the first five years the proposed amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that, for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of administering the section will be greater clarification of the eligibility requirements of the program. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, Lois.Hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §56.209, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, Chapter 56, Subchapter K, relating to the Early High School Graduation Scholarship Program.

The proposed amendments affect Texas Education Code, §§56.201 - 56.210.

§21.951. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (2) (No change.)

(3) Graduate, To--To complete all the academic requirements, including course work and examinations, for graduation from high school. This definition does not apply to individuals who meet these requirements but choose to continue enrollment beyond the end of the term in which they meet the graduation requirements. [~~High school graduate--An individual who has completed the requisite number of units, the prescribed courses, the examinations and other requirements and has received, or is eligible to receive, a high school diploma from a public high school in Texas.~~]

(4) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER NN. EXEMPTION PROGRAM FOR VETERANS AND THEIR DEPENDENTS (THE HAZLEWOOD ACT)

19 TAC §§21.2100, 21.2102 - 21.2106

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §§21.2100 and 21.2102 - 21.2106 concerning the Exemption Program for Veterans and their Dependents (The Hazlewood Act). Specifically, proposed amendments to §21.2100 (Definitions), paragraph (1), reflect the fact that relevant tuition and fee charges for credit hours dropped before the census date are to be counted in determining how many of the original 150 hours of eligibility a student has remaining. Proposed amendments to §21.2100, paragraph (4), bring the definition of "children" for the Hazlewood Act into agreement with the definition used for the exemption for the children of deceased public servants. This should simplify the process of documenting most children's eligibility because it will require tax returns only for children who are not biological or had not been adopted by the veteran at the time of his or her death or major disability. Proposed amendments to paragraph (8) clarify that the child of an otherwise eligible veteran is eligible for the exemption if he or she was claimed as a dependent the year prior to the veteran's death or disabling injury. Paragraph (16) is deleted, since "date of registration" is the same as "census date," a term already defined in rule. Paragraphs (17) - (20) are renumbered as paragraphs (16) -(19). Proposed amendments to §21.2102 and §21.2103 reflect the new provisions from Senate Bill 1640 that veterans are no longer required to exhaust their federal benefits before using benefits under the Hazlewood Act. They are entitled to combine federal and state education benefits in the same term if the value of the federal benefits does not exceed the value of the state benefit. Proposed amendments to §21.2104 replace the term "registration date" with the more common term "census date." Proposed amendments to §21.2105 reflect new provisions from House Bill 125, passed by the 80th Texas Legislature, which extends the Hazlewood Act benefit to the children of veterans who are

disabled as a result of service-related injuries. In addition, they indicate a veteran's place of entry into the service is not sufficient evidence that the person was a Texas resident at that time. Proposed amendments to §21.2106 clarify that veterans or eligible children who continue to use benefits under the Hazlewood Act no longer have to first exhaust their federal benefits if the value of the federal exemption is less than the value of the state exemption. It also indicates the persons continuing to receive awards through the program must complete and summit applications each term in which they receive an exemption.

Ms. Lois Hollis, Assistant Commissioner for Student Services, has estimated that, for each year of the first five years the proposed amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the amended rules.

Ms. Hollis has also determined that, for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of administering the amended sections will be that veterans or their children will better understand their options in using the Hazlewood exemption. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, Lois.Hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §54.203, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §54.203.

The proposed amendments affect Texas Education Code, §54.203.

§21.2100. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Attempted credit hours--Hours for which the veteran is registered as of the first day of classes [~~census date~~] of a term or semester.

(2) - (3) (No change.)

(4) Children--The veteran's biological or adopted children who, (a) on the date of the death or disabling injury of the veteran, are younger than 18 years of age; and (b) persons who, if they are not biological or adopted children, were claimed as dependents on the federal income tax return of the veteran for the year preceding the year of the veteran's death or disabling injury. [~~Persons who were dependents of members of the armed forces of the United States at the time they were killed or died or became totally disabled for purposes of employability as a result of injuries directly associated with military service or dependents of members of the Texas National Guard and the Texas Air National Guard killed since January 1, 1946, or who became totally disabled for purposes of employability as a result of a service-related injury suffered since January 1, 1946 while on active duty either in the service of Texas or the United States.~~]

(5) - (7) (No change.)

(8) Dependent--An individual who was claimed as a dependent for federal income tax purposes by the individual's parent or court-appointed legal guardian in a particular year and in the previous tax year. A veteran was a dependent if he or she was claimed as such by a parent or legal guardian during the veteran's year of entry into the service and in the previous tax year. A child was a dependent if he or she was claimed as a dependent for tax purposes the year preceding the year of the veteran's death or disabling injury [~~at the time his or her parent or legal guardian died of injuries or illness directly related to military service~~].

(9) - (15) (No change.)

[~~(16) Registration, date of--The census date of the term for which the student is applying for the Hazlewood Act Exemption.~~]

(16) [~~(17)~~] Resident of Texas--A resident of the State of Texas as determined in accordance with Chapter 21, §§21.727 - 21.736, of this title (relating to Determination of Resident Status and Waiver Programs for Certain Nonresident Persons)[~~Chapter 21, §§21.21 - 21.27 of this title (relating to Determining Residence Status)~~].

(17) [~~(18)~~] Student service fees--Fees that an institution may, under Texas Education Code, §§54.503, 54.5061 and 54.513, elect to charge to students to cover the cost of student services.

(18) [~~(19)~~] Training--Time spent as a member of the armed forces that is not included in the "Net Active Service" or the sum of "Net Active Service" indicated on the Certificate of Release or Discharge from Active Duty (DD214).

(19) [~~(20)~~] Tuition--All types of tuition that an institution may, under Texas Education Code, Chapter 54, collect from students attending the institution, including statutory tuition, discretionary tuition, designated tuition, and board-authorized tuition.

§21.2102. Eligible Veterans.

In order to be eligible to receive a Hazlewood Act Exemption, a veteran shall demonstrate that he or she:

(1) - (3) (No change.)

(4) has no federal veteran's education benefits, or, if he or she has such benefits, that the value of the benefits [~~has exhausted his or her federal veteran's education benefits~~], including such benefits as those issued under Title 38, United States Code, Chapters 30, 32, and 35, and Title 10, United States Code, Chapters 1606 and 1607 are less than the value of the student's tuition and fees less property deposit and student service fees for the relevant term;

(5) - (8) (No change.)

§21.2103. Eligible Children.

In order to be eligible to receive a Hazlewood Act Exemption, children shall demonstrate that they:

(1) (No change.)

(2) have no federal veteran's education benefits, [~~have exhausted their federal survivor benefits~~] based on the death or disability of a veteran parent that the value of the benefits is less than the value of the children's tuition and fees less property deposit and student service fees for the term in which the exemption is to be used; and

(3) (No change.)

§21.2104. The Application.

(a) (No change.)

(b) For an otherwise eligible veteran or child to be entitled to a Hazlewood Act exemption in a given term or semester, he or she must provide a completed Hazlewood Act Exemption Application and provide the supporting documentation to the institution no later than the census date [~~registration date~~] of that term or semester.

(c) (No change.)

§21.2105. Supporting Documentation for the Hazlewood Act Exemption Application.

(a) (No change.)

(b) When applying for the first time for the Hazlewood Act Exemption, a child shall provide to the institution, along with the Hazlewood Act Exemption Application, the following supporting documentation:

(1) proof that the parent veteran's death or disability was a result of injury or illness directly associated with service in the U.S. Armed Forces, or that the National Guard parent was killed or disabled while he or she was on active duty either in the service of Texas or the United States;

(2) proof of the child's current status regarding eligibility for federal [~~survivors~~] benefits awarded on the basis of the parent's service-related death or disability;

(3) proof that the child was a dependent of the veteran at the time the veteran died, [~~and~~]

(4) documentation that the parent was a resident of Texas when he or she entered the service; and[~~.~~]

(5) (for the child of a disabled veteran or guardsman) documentation that the veteran has been rated by the Veterans' Administration as unemployable due to his or her service-related injuries.

§21.2106. Subsequent Hazlewood Exemption Applications.

(a) For each term or semester of an academic year in which the veteran or child receives a Hazlewood Act Exemption, the institution shall confirm that the veteran or child:

(1) has not exhausted his or her 150 credit hours of eligibility through the program,

(2) is still classified as a resident student,

(3) has no federal veteran's benefits, or if he or she has [~~exhausted his or her~~] federal veterans [~~or survivor's~~] education benefits that the value of the benefits is less than the student's tuition and fees less property deposit and student service fees for the term, and

(4) is not in default on a loan made or guaranteed by the state of Texas or federal government.

(b) For each term or semester of an academic year in which the veteran or child receives a Hazlewood Act Exemption, he or she shall submit the appropriate program application.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703563
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 25, 2007
For further information, please call: (512) 427-6114

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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS

SUBCHAPTER Q. ENGINEERING SCHOLARSHIP PROGRAM

19 TAC §§22.312 - 22.318

The Texas Higher Education Coordinating Board proposes new §§22.312 - 22.318 concerning the Engineering Scholarship Program. New sections of Board rules were adopted on an emergency basis at the July Coordinating Board meeting to implement House Bill 2978, passed by the 80th Texas Legislature. The new sections established rules for engineering recruitment programs, which include both an engineering summer program and an engineering scholarship program. Following the July Board meeting, staff decided the programs could be more effectively administered if rules for the summer program were separated from rules for the scholarship program. Rules for the summer program will be proposed in other sections of Board rules. Specifically, new §22.312 describes the authority, scope, and purpose of the rules. New §22.313 provides definitions for terms used in the sections. New §22.314 describes the scholarship program announcement that is to be made by the Coordinating Board, indicating funding for the program, application procedures and student eligibility requirements. New §22.315 provides detailed information regarding student eligibility requirements. The section also addresses the issue of continuation awards. New §22.316 describes how annual award amounts are to be announced to institutions. New §22.317 describes scholarship application procedures for institutions and clarifies that institutions must not make awards in excess of their allocation of funds. New §22.318 describes reporting requirements for participating institutions.

Ms. Lois Hollis, Assistant Commissioner for Student Services, has determined that for each year of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of administering the sections will be financial support to help recruit and retain more engineering students. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, Lois.Hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are adopted under the Texas Education Code §61.792(c), which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §61.792.

The new sections affect Texas Education Code, §61.792.

§22.312. Authority, Scope, and Purpose.

(a) Authority. Authority for this subchapter is provided in the Texas Education Code, Chapter 61, Subchapter Q, Engineering Recruitment Programs. This subchapter establishes rules for administering the engineering scholarship program established by the Texas Higher Education Coordinating Board in keeping with Texas Education Code, §61.792.

(b) Scope. Unless otherwise noted, this subchapter applies to any general academic teaching institution (Texas Education Code, §61.003) that offers an engineering degree program and their students.

(c) Purpose. The purpose of this program is to provide scholarships to students pursuing a degree in engineering at a participating general academic teaching institution.

§22.313. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board or Coordinating Board--the Texas Higher Education Coordinating Board.

(2) Commissioner--the Commissioner of Higher Education.

(3) Eligible institution--any general academic teaching institution that offers one or several undergraduate degree programs in engineering.

(4) Engineering degree program--any undergraduate degree program in engineering at an eligible institution.

(5) Engineering student--student enrolled at an eligible institution in an undergraduate engineering degree program.

(6) Application--a scholarship application submitted by an eligible student.

§22.314. Scholarship Program Announcement.

The Board shall post the scholarship announcement and application form for the scholarships on the agency website. The scholarship announcement shall contain information about:

(1) financial resources available for distribution,

(2) application procedures for the scholarships, and

(3) student eligibility requirements.

§22.315. Student Eligibility Requirements.

(a) To qualify for an engineering scholarship, a person must:

(1) have graduated high school in the top 20 percent of the student's high school graduating class;

(2) have graduated from high school with a grade point average of at least 3.5 on a four-point scale or the equivalent in mathematics and science courses offered under the recommended or advanced high school program under the Texas Education Code, §28.025(a);

(3) enroll in an undergraduate engineering program offered by a general academic teaching institution in Texas; and

(4) maintain an overall grade point average of at least 3.0 on a four-point scale at the institution in which the engineering student is enrolled.

(b) Scholarships awarded in a given year do not represent an entitlement for future awards but award recipients in one year may compete for awards in subsequent years.

§22.316. Award Amounts and Continuing Eligibility.

The maximum award per student for a given academic year will be determined by the Commissioner and announced to institutions at the time they are informed of their share of funds for the year.

§22.317. Application Process.

(a) Eligible institutions shall:

(1) make the program application form accessible to all engineering students in paper or through electronic access;

(2) collect engineering student applications;

(3) verify student eligibility;

(4) select scholarship recipients to reflect the demographics of the state; and, to the extent possible;

(5) use the scholarships to augment, not replace, other gift aid.

(b) The value of awards made for a given year by an institution may not exceed the funds allocated to the institution for that year by the Coordinating Board.

§22.318. Reporting Requirements.

At the end of the scholarship period as defined in the scholarship announcement, eligible institutions shall report to the Board the number of scholarships awarded, the value of the awards, as well as other demographic data in a format specified by the Commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703562
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 25, 2007
For further information, please call: (512) 427-6114

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SUBCHAPTER R. PROVISIONS REGARDING SCHOLARSHIPS TO RELATIVES OF BOARD MEMBERS OF INSTITUTIONS OF HIGHER EDUCATION

19 TAC §§22.401 - 22.407

The Texas Higher Education Coordinating Board proposes new §§22.401 - 22.407 concerning Provisions Regarding Scholarships to Relatives of Board Members of Institutions of Higher Education. Specifically, Senate Bill 1325, passed by the 80th Texas Legislature, added Texas Education Code §51.969 and authorized the Board to adopt rules to implement the section, beginning with scholarships for which a scholarship application was filed on or after January 1, 2008. The new sections will establish definitions, identify the categories of scholarships to which the restrictions shall apply, identify the possible penalty for failure to adhere to program requirements, and direct institutions to the Coordinating Board's web site for wording of the statement to be filed by scholarship recipients.

Ms. Lois Hollis, Assistant Commissioner for Student Services, has determined that for each year of the first five years the new rules are in effect, there will be no significant fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the new rules are in effect the public benefit anticipated as a result of administering the sections will be a more equal opportunity for all eligible students to compete for scholarships. There is no effect on small businesses. There are no anticipated

economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, Lois.Hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Education Code, §51.969 which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §1.969.

The new sections affect Texas Education Code, §51.969.

§22.401. Authority and Purpose.

(a) Authority. Authority for this subchapter is provided in Subchapter Z, Chapter 51 of the Texas Education Code. These rules establish procedures to administer the subchapter as prescribed in the Texas Education Code, §51.969.

(b) Purpose. The purpose of these provisions is to provide guidance for institutions in the awarding of certain scholarships in such way as to avoid criminal penalties.

§22.402. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Affinity--Relationship between individuals based on being married or the fact that the spouse of one of the individuals is related by consanguinity to the other individual. The ending of a marriage ends relationships by affinity unless a child of that marriage is living, in which case the affinity continues as long as a child of that marriage lives. These relationships are named as follows:

(A) 1st Degree--Spouse, spouse's child, spouse's mother or father, child's spouse, parent's spouse.

(B) 2nd Degree--Spouse's brother or sister, spouse's grandparent, spouse's grandchild, brother or sister's spouse, grandparent's spouse, grandchild's spouse.

(2) Board or Coordinating Board--the Texas Higher Education Coordinating Board.

(3) Consanguinity--Relationship between individuals based on being descendants of one another or sharing a common ancestor. An adopted child is considered to be a child of the adoptive parent. These relationships are named as follows:

(A) 1st Degree--Mother, father, daughter, son.

(B) 2nd Degree--Brother, sister, grandparent, grandchild.

(C) 3rd Degree--Great-grandparent, great-grandchild, uncle (brother of parent), aunt (sister of parent), nephew (son of brother or sister), niece (daughter of brother or sister).

(4) Institution of Higher Education--A public institution of higher education as defined in Texas Education Code Chapter 61, §61.003.

(5) Scholarship--An award of gift aid that does not have to be repaid by the student or earned through service or performance.

(6) University System--The association of one or more public senior colleges or universities, medical or dental units or other agencies of higher education under the policy direction of a single governing board.

(7) Within the Second Degree by Affinity--A circumstance in which a person is a spouse of an individual or the child of the spouse of an individual.

(8) Within the Third Degree by Consanguinity--A circumstance in which a person is a child, grandchild or great-grandchild of an individual from whom he or she is a descendant or with whom the person shares a common ancestor. An adopted child is considered to be a child of the adoptive parent for this purpose.

§22.403. Relevant Institutions.

The provisions of these rules apply to persons attending any institution of higher education in Texas.

§22.404. Prohibited Scholarships.

A person is not eligible to receive a scholarship originating from and administered by an institution of higher education or university system if the person is related to a current member of the governing board of the institution or system if the scholarship application is filed on or after January 1, 2008, unless:

(1) the scholarship is granted by a private organization or third party not affiliated with the institution of higher education or university system;

(2) the scholarship is awarded exclusively on the basis of prior academic merit;

(3) the scholarship is an athletic scholarship; or

(4) the relationship is not within the third degree by consanguinity or the second degree by affinity.

§22.405. Declaration of Eligibility.

A person applying for a scholarship originating from and administered by an institution of higher education or university system must file a written statement with the application indicating whether the person is related within the third degree by consanguinity or the second degree by affinity to a current member of the governing board of the institution or system. The required wording of the statement will be developed by the Board and will be made available to institutions via the Coordinating Board's web site.

§22.406. Criminal Penalty.

A person commits a Class B misdemeanor offense if the person knowingly files a false statement under §22.405 of this title (relating to Declaration of Eligibility).

§22.407. Dissemination of Information and Rules.

The Board is responsible for publishing and disseminating general information and program rules for the provisions described in this subchapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703561
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 25, 2007
For further information, please call: (512) 427-6114

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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.5, §153.9

The Texas Appraiser Licensing and Certification Board proposes amendments to §153.5, concerning Fees and §153.9, concerning Applications.

Section 153.5 proposes amendments which would add language establishing an education evaluation fee of $30. The amendments will also increase the application and renewal fees by $30 each year.

Section 153.9 proposes amendments which would add language requiring applicants to submit their education for evaluation prior to submitting their application for licensure or certification. The amendment also revises TALCB applications to incorporate the fee changes being proposed.

Troy Beaulieu, attorney for the Texas Appraiser Licensing and Certification Board, after consulting with Karen Alexander, director of staff services, has determined that for the first five-year period §153.5 is in effect there will be fiscal implications for the state as a result of enforcing or administering the section. Annual revenues would increase by approximately $221,130 for FY 2008 and $265,380 for each year thereafter for the first five years after the section as amended is in effect. There are no fiscal implications for state government as a result of enforcing or administering §153.9. There are no fiscal implications anticipated for local government and there is no anticipated impact on local or state employment as a result of implementing the sections as proposed.

Mr. Beaulieu also has determined that for each year of the first five years the amendments are in effect, the anticipated public benefit as a result of these amendments is that the application, renewal and other fees being added or increased by adoption of the rule will provide additional revenue for the Texas Appraiser Licensing and Certification Board to facilitate accomplishing the agency's statutory duties and obligations (i.e. licensing and regulating real estate appraisers and protecting consumers of real estate appraisal services). There will be a small effect on small businesses for §153.5, since appraisal service oriented businesses will obviously be paying additional fees to obtain or renew a license or certification. There are obviously anticipated costs to persons who are required to comply with the section as proposed, namely the $30 increase in application fees annually, the $30 increase in renewal fees annually and the $30 education evaluation fee. There will be no effect on §153.9 for small businesses and there is no anticipated cost to persons who are required to comply with the section as proposed.

Comments on the proposed amendments may be submitted to Troy Beaulieu, attorney for the Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under the Texas Appraiser Licensing and Certification Act, Subchapter D, Board Powers and Duties (Occupations Code, Chapter 1103), which provides the board with authority to adopt rules under §1103.151, Rules Relating to Certification and Licenses and §1103.154, Rules Relating to Professional Conduct.

No other code, article, or statute is affected by this proposal

§153.5. Fees.

(a) The board shall charge and the commissioner shall collect the following fees:

(1) an application or renewal fee for a general certification of $260 [~~$200~~], for residential certification of $210 [~~$150~~], or for licensing of $185 [~~$125~~];

(2) an application or renewal fee for approval as an appraiser trainee of $105 [~~$75~~];

(3) (No change.)

(4) a fee for nonresident appraiser registration of $180 [~~$150~~];

(5) - (18) (No change.)

(19) an on-line subscription application fee of $5 for appraiser trainees for establishing and maintaining on-line applications; [~~and~~]

(20) a fee of $5 for a Pocket ID for certified general, certified residential, state licensed, and provisional licensed appraisers; and [~~.~~]

(21) a fee of $30 for evaluation of an applicant's education.

(b) - (c) (No change.)

§153.9. Applications.

(a) A person desiring to be certified or licensed as an appraiser or approved as an appraiser trainee or registered as a temporary nonresident appraiser shall file an application using forms prescribed by the board. The board may decline to accept for filing an application which is materially incomplete or which is not accompanied by the appropriate fee. Prior to submission of any application, an applicant shall submit the applicant's education for evaluation and approval along with the requisite education evaluation fee and must obtain a written response from the Board showing the applicant meets current education requirements for the applicable license or certification. Any such approval shall then remain valid for one year from the date of issuance. Except as provided by the Act, the board may not grant a certification, license or approval of trainee status to an applicant unless the applicant:

(b) The Texas Appraiser Licensing and Certification Board adopts by reference the following forms approved by the board and published and available from the board, P.O. Box 12188, Austin, Texas 78711-2188:

(1) Application for Appraiser Certification or Licensing, TALCB Form ACL 1-1 (10/07) [~~ACL 1-0 (06)~~];

(2) Application for Provisional Appraiser License, TALCB Form APL 2-1 (10/07) [~~APL 2-0 (06)~~];

(3) (No change.)

(4) Application for Approval as an Appraiser Trainee, TALCB Form AAT 3-1 (10/07) [~~AAT 3-0 (06)~~];

(5) Supplement to Application for Appraiser Certification or Licensing by Reciprocity, TALCB Form ACR 4-1 (10/07) [~~ARC 4-0 (06)~~];

(6) Temporary Non-Resident Appraiser Registration, TALCB Form TRN 5-1 (10/07) [~~TRN 5-0 (06)~~];

(7) Extension of Non-Resident Temporary Practice Registration, TALCB Form NRE 5E-1 (10/07) [~~NRE 5E-0 (804)~~];

(8) - (12) (No change.)

(13) Extension Request Form (For Residential/General Certified and State Licensed Appraisers) TALCB Form ExtReq 11-1 (10/07);

(14) Extension Request Form for Provisional Licensee TALCB ExtReq-Provisional 12-1 (10/07);

(15) - (17) (No change.)

(c) (No change.)

(d) A certification, license, or appraiser trainee approval is valid for the term for which it is issued by the board unless suspended or revoked for cause and unless revoked, may be renewed in accordance with the requirements of §153.17 of this title (relating to Renewal of Certification, License or Trainee Approval).

(e) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703588
Troy Beaulieu
Board Attorney
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 465-3959

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PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES SUBCHAPTER D. APPLICATIONS, EXAMINATIONS, AND LICENSING

22 TAC §661.57

The Texas Board of Professional Land Surveying (TBPLS) proposes a new section §661.57, concerning compliance with the registration of firms. The new rule is proposed in order to implement recently passed legislation as a result of H.B. 2820.

The proposed new rule will enact the requirement of The Professional Land Surveying Practices Act, §1071.352, Surveying by Business Entity.

Sandy Smith, Executive Director, has determined that, for the first five-year period the proposed new rule is in effect, there will be no fiscal impact to state or local government as a result of enforcing or administering this new rule.

Ms. Smith has also determined that, for each year of the first five years the rule is in effect, the public will benefit from the proposed new rule because it will implement procedures for registering firms that offer land surveying services.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the new rule as proposed.

Comments on the proposed new rule may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, TX 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of a rule proposal in the section has been published in the *Texas Register*.

The new rule is proposed pursuant to §1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed new rule implements the Texas Administrative Code, Title 22, Part 29, General Rules of Procedures and Practices.

§661.57. Surveying Firm Compliance.

(a) Any firm or other business entity shall not offer or perform surveying services to the public unless registered with the board pursuant to the requirements of §661.55 of this title (relating to Survey Firm Registration).

(b) A firm shall provide that at least one full-time active license holder is employed with the entity and that the active license holder performs or directly supervises all surveying work and activities that require a license that is performed in the primary or branch office(s).

(c) An active license holder who is a sole practitioner shall satisfy the requirement of the regular, full-time employee.

(d) No surveying services are to be offered to or performed for the public in Texas by a firm while that firm does not have a current certificate of registration.

(e) A business entity that offers or is engaged in the practice of surveying in Texas and is not registered with the board or has previously been registered with the board and whose registration has expired shall be considered to be in violation of the Act and board rules and will be subject to administrative penalties as set forth in §1071.451 and §1071.452 of the Act and §661.99 of this title (relating to Sanctions and Penalty Matrix).

(f) The board may revoke a certificate of registration that was obtained in violation of the Act and/or board rules including, but not limited to, fraudulent or misleading information submitted in the application or lack of employee relationship with the designated professional surveyor for the firm.

(g) If a firm has notified the board that it is no longer offering or performing surveying services to the public, including the absence of a regular, full-time employee who is an active professional surveyor licensed in Texas, the certificate of registration will expire.

(h) In addition to any other penalty provided in this section, the Board shall have the power to fine, refuse to issue or renew and/or revoke the registration of a business entity where one or more of its officers, directors, partners, members, or managers have been found guilty of any conduct which would constitute a violation of the Board's Act or Rules.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703535
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 239-5263

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PART 40. ADVISORY BOARD OF ATHLETIC TRAINERS

CHAPTER 871. ATHLETIC TRAINERS
SUBCHAPTER A. GENERAL GUIDELINES AND REQUIREMENTS

22 TAC §§871.1, 871.3, 871.6, 871.11, 871.12, 871.14

The Advisory Board of Athletic Trainers (board) proposes amendments to §§871.1, 871.3, 871.6, 871.11, 871.12, and 871.14, concerning the licensure and regulation of athletic trainers.

BACKGROUND AND PURPOSE

In accordance with Occupations Code, Chapter 451, the rules are being amended to establish a complaints committee; incorporate the committee into the complaint process and establish procedures for complaint resolution. Additionally, the amendments delete the Administrative Services Committee; remove references to licenses issued for one year; allow late renewal without penalty for military personnel who are on active duty inside Texas; reduce the number of allowable continuing education credits for serving as a skills examiner; and accurately reflect the continuing education audit process.

SECTION-BY-SECTION SUMMARY

The amendment to §871.1 removes the reference to the Administrative Services Committee.

The amendment to §871.3 removes the reference to the Administrative Services Committee and establishes the Complaints Committee as a committee of the board.

Amendments to §871.6 remove out-dated fees that are no longer valid due to two-year license issuance.

Amendments to §871.11 remove out-dated language that is longer valid due to two-year license issuance and allow military personnel who are serving on active duty inside the State of Texas to renew late without penalty.

Amendments to §871.12 remove out-dated language that is no longer valid due to two-year license issuance. Additionally, the amendments reduce the number of allowable continuing education credits for serving as a skills examiner at the state licensure exam from six to four hours every two years; and accurately reflect continuing education audit procedures.

Amendments to §871.14 incorporate the newly created Complaints Committee into the complaint process and establish procedures for complaint resolution.

FISCAL NOTE

Heather Muehr, Program Director, has determined that for each fiscal year of the first five years the sections are in effect, there will be no fiscal implications to the state as a result of enforcing or administering the sections as proposed. Implementation of the proposed sections will not result in any fiscal implications for local governments.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Muehr has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Muehr has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the licensing and regulation of athletic trainers.

REGULATORY ANALYSIS

The board has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment of reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is specially intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The board has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to, Heather Muehr, Program Director, Advisory Board of Athletic Trainers, 1100 West 49th Street, Austin, Texas 78756, or by email to heather.muehr@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

STATUTORY AUTHORITY

The amendments are proposed under Texas Occupations Code, §451.103, which authorizes the board to adopt rules necessary for the performance of its duties.

The amendments affect Occupations Code, Chapter 451.

§871.1. Definitions.

The following words and terms, when used in these rules shall have the following meanings unless the context clearly indicates otherwise. Words and terms defined in the Athletic Trainers Act shall have the same meaning in these rules:

(1) - (10) (No change.)

(11) Executive secretary emeritus--A licensed athletic trainer who has been previously employed by the board as the director of board licensing activities and who currently serves at the direction of the board [and provides guidance to the Administrative Services Committee].

(12) - (15) (No change.)

§871.3. The Board's Operation.

(a) - (e) (No change.)

(f) The board or the chair with the approval of the board may establish committees necessary to assist the board in carrying out its duties and responsibilities.

(1) - (5) (No change.)

(6) The following standing committees may be appointed by the chair:

(A) the Complaints Committee [Administrative Services Committee];

(B) - (E) (No change.)

(g) - (q) (No change.)

§871.6. Fees.

(a) The schedule of fees of the board is as follows:

(1) - (4) (No change.)

[(5) initial license fee for a license issued before January 1, 2005--$50;]

(5) [(6)] initial license fee [for a license issued after January 1, 2005]--$100;

(6) [(7)] child support reinstatement fee--$75;

(7) [(8)] returned check fee--$25;

[(9) renewal license that is issued for a one-year period--$125;]

(8) [(10)] renewal license [that is issued for a two-year period]--$250; and

(9) [(11)] late renewal fee:

(A) a fee that is equal to one and one-half times the normally required renewal fee when renewed on or within 90 days of expiration; or

(B) a fee that is equal to two times the normally required renewal fee when renewed more than 90 days, but less than one year after expiration.

(b) - (e) (No change.)

§871.11. License Renewal.

(a) Licenses are valid for two years from the date of issuance. [Licenses issued between January 1, 2005, and December 31, 2005, are valid for a one-year period or a two-year period, as determined by the department, commencing on the date of issuance of the initial license. All licenses issued on or after January 1, 2006, are valid for a two-year period.]

(b) - (h) (No change.)

(i) If a licensee fails to timely renew his or her license because the licensee is or was on active duty with the armed forces of the United States of America [serving outside the State of Texas], the licensee may renew the license pursuant to this subsection.

(1) - (8) (No change.)

§871.12. Continuing Education Requirements.

(a) (No change.)

(b) Hours required for continuing education. A licensee must complete 20 clock-hours of continuing education during each two-year period. In addition to the 20 clock-hours of continuing education, a licensee must also successfully complete a cardiopulmonary resuscitation (CPR) techniques course and an automated external defibrillation course during each two-year period. The two-year period begins on the first day following the license issuance month and ends upon the expiration date of the license.

[(1) A licensee that is on a one-year renewal cycle must complete 30 clock-hours of continuing education during each three-year period as described in this subsection. In addition to the 30 clock-hours of continuing education, a licensee must also successfully complete a cardiopulmonary resuscitation (CPR) techniques course and an automated external defibrillation course during each three-year period. The three-year period begins on the first day following the issuance month and ends on the last day of the licensee's renewal month. The initial period shall begin with the date the board issues the license certificate and ends on the last day of the third renewal cycle.]

[(2) A licensee that is on a two-year renewal cycle must complete 20 clock-hours of continuing education during each two-year period. In addition to the 20 clock-hours of continuing education, a licensee must also successfully complete a cardiopulmonary resuscitation (CPR) techniques course and an automated external defibrillation course during each two-year period. The two-year period begins on the first day following the license issuance month and ends upon the expiration date of the license.]

(c) Continuing education credit undertaken by a licensee for renewal shall be acceptable if the experience falls in one or more of the following categories:

(1) - (5) (No change.)

(6) serving as a skills examiner at the state licensure examination not to exceed one clock-hour of continuing education credit for each examination date for a maximum of four [six] clock-hours of credit each continuing education period; or

(7) (No change.)

(d) - (f) (No change.)

(g) The audit process shall be as follows.

(1) The department shall select for audit a random sample of licensees for each renewal month. Licensees will be notified of the continuing education audit when they receive their renewal documentation. [Audit forms shall be sent to the selected licensees.]

(2) All licensees selected for audit will furnish documentation such as official transcripts, certificates, diplomas, an affidavit identifying the continuing education experience satisfactory to the board, or any other documentation requested by the board to verify having earned the required continuing education hours [listed on the continuing education report form]. The documentation must be provided to the department with the renewal form and payment [upon request].

(3) (No change.)

(h) A licensee who has failed to complete the requirements for continuing education may be granted a 180-day extension to the continuing education period.

(1) (No change.)

(2) The subsequent continuing education period shall end two [~~three~~] years from the date the previous continuing education period expired or upon the expiration of the license, not the date of the end of the extension period.

(3) - (4) (No change.)

(i) - (j) (No change.)

§871.14. Violations, Complaints, and Disciplinary Actions.

(a) - (c) (No change.)

(d) Complaints shall be investigated in accordance with the following procedures.

(1) The program director shall conduct an initial review of the complaint to determine jurisdiction and alleged Act or rule violations [~~make the initial investigation and report the findings to the executive secretary~~]. After conducting the initial review, the program director will determine if additional information is needed or if the complaint should be closed, referred to the complaint committee or referred for investigation.

(2) (No change.)

(3) If it is determined that the matters alleged in the complaint are non-jurisdictional, or would not constitute a violation of the Act or this chapter, the program director, after consulting with the board's attorney may dismiss the complaint and give written notice of dismissal to the licensee or person against whom the complaint has been filed, the complainant, and the complaint committee. [~~If the program director determines that the complaint does not come within the board's jurisdiction, the program director shall advise the complainant and, if possible, refer the complainant to the appropriate governmental agency for handling such a complaint.~~]

(4) (No change.)

(5) The Complaints Committee [~~executive secretary~~] may recommend that the license be revoked, suspended, suspended with probation, suspended on an emergency basis, denied, or that the licensee be reprimanded, that administrative penalties be assessed, or other enforcement action authorized by law.

(6) If the Complaints Committee determines [~~executive secretary and the program director determine~~] that there are insufficient grounds to support the complaint, the program director shall dismiss the complaint and give written notice of the reason for dismissal to the licensee or person against whom the complaint has been filed and the complainant.

(e) The Complaints Committee may recommend that the board [~~The board may~~] deny an application or initiate disciplinary actions as described in subsection (d)(5) of this section for a violation of the Act or this chapter.

(f) The program director [~~executive secretary~~] shall give written notice to the applicant [~~licensee~~] by certified mail, return receipt requested, of the facts or conduct alleged to warrant the action, and the applicant [~~licensee~~] shall be given an opportunity, as described in the notice, to show compliance with all requirements of the Act and this chapter.

(g) If disciplinary action is proposed, the program director [~~executive secretary~~] shall give written notice by certified mail, return receipt requested, that the licensee or applicant must request, in writing, a formal hearing within 20 days of receipt of the notice, or the right to a hearing shall be waived and the action shall be taken.

(h) Informal disposition of any complaint or contested case involving a licensee or an applicant for licensure may be made through an informal settlement conference held to determine whether an agreed settlement order may be secured. The Complaints Committee [~~executive secretary~~] may determine whether the public interest would be served by attempting to resolve a complaint or contested case with an agreed order in lieu of a formal hearing.

(1) An informal settlement conference shall be voluntary and shall not be a prerequisite to a formal hearing. The program director shall establish the time, date and place of the informal hearing, and provide written notice to the licensee or applicant. Notice shall be provided no less than 10 working days prior to the date of the informal hearing by certified mail, return receipt requested to the last known address of the licensee or applicant. The licensee or applicant may waive the 10-day notice requirement.

(2) (No change.)

(3) The licensee or applicant, the licensee's or applicant's attorney, a complaints committee member, the executive secretary, the program director, and the board's attorney may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(4) (No change.)

(5) At the conclusion of the settlement conference, the complaints committee member, the executive secretary , the program director or the program attorney [~~or his designee~~] may make recommendations for informal disposition of the complaint or contested case. The recommendations may include any disciplinary action authorized by the Act. The complaints committee member, the executive secretary , the program director or the program attorney [~~or his designee~~] may also conclude that the board lacks jurisdiction, conclude that a violation of the Act or this chapter has not been established, order that the investigation be closed, or refer the matter for further investigation.

(6) The licensee or applicant may either accept or reject the recommendations at the informal hearing. If the recommendations are accepted, an agreed order shall be prepared by the board office or the board's legal counsel and forwarded to the licensee or applicant. The order may contain agreed findings of fact and conclusions of law. The licensee or applicant shall execute the order and return the signed order to the board office within 10 working days of his or her receipt of the order. If the licensee or applicant fails to return the signed order within the stated time period, the inaction shall constitute rejection of the recommendations.

(7) If the licensee or applicant signs and accepts the proposed recommendations, the agreed order shall be submitted to the complaints committee and the board for approval. Placement of the agreed order on the committee and board agendas shall constitute only a recommendation for approval by the board.

(8) The identity of the licensee or applicant shall not be made available to the board until after the board has reviewed and accepted the agreed order unless the licensee or applicant chooses to attend the board meeting. The licensee or applicant shall be notified of the date, time, and place of the board meeting at which the proposed agreed order will be considered. Attendance by the licensee or applicant is voluntary.

(9) Upon an affirmative majority vote, the board shall enter an agreed order approving the accepted recommendations. The board may not change the terms of a proposed order but may only approve or disapprove an agreed order unless the licensee or applicant is present at the board meeting and agrees to other terms proposed by the board.

(10) If the board does not approve a proposed agreed order, the licensee or applicant shall be so informed. The matter shall be referred to the program director for other appropriate action.

(11) A proposed agreed order is not effective until the board has approved the order and it is signed by the board chair.

(12) A licensee's or applicant's opportunity for an informal hearing under this section shall satisfy the requirement of the Administrative Procedure Act, Texas Government Code, §2001.054(c).

(13) If a licensee or applicant who has requested an informal hearing fails to appear at the hearing and fails to provide notice of their inability to attend the hearing at least 24 hours in advance of the time the hearing is scheduled, such action may constitute a withdrawal of the request for a formal hearing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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David Weir
Chair
Advisory Board of Athletic Trainers
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For further information, please call: (512) 458-7111 x6972

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 113. STANDARDS OF PERFORMANCE FOR HAZARDOUS AIR POLLUTANTS AND FOR DESIGNATED FACILITIES AND POLLUTANTS

SUBCHAPTER C. NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES (FCAA, §112, 40 CFR PART 63)

30 TAC §§113.100, 113.105, 113.106, 113.110, 113.120, 113.170, 113.180, 113.190, 113.200, 113.220, 113.230, 113.240, 113.250, 113.260, 113.280, 113.300, 113.320, 113.330, 113.350, 113.380, 113.390, 113.400, 113.420, 113.430, 113.440, 113.500, 113.550, 113.560, 113.600, 113.620, 113.640, 113.650, 113.670, 113.690, 113.700, 113.710, 113.720, 113.730, 113.740, 113.750, 113.770, 113.780, 113.810, 113.840, 113.860, 113.870, 113.880, 113.890, 113.900, 113.910, 113.920, 113.930, 113.940, 113.960, 113.970, 113.980, 113.990, 113.1000, 113.1010, 113.1030, 113.1040, 113.1060, 113.1070, 113.1080, 113.1090, 113.1100, 113.1110, 113.1120, 113.1130, 113.1140, 113.1150, 113.1160, 113.1170, 113.1180, 113.1190, 113.1200, 113.1210, 113.1220, 113.1230, 113.1250, 113.1260, 113.1270, 113.1280, 113.1290, 113.1390, 113.1400, 113.1410, 113.1420

The Texas Commission on Environmental Quality (commission) proposes amendments to §§113.100, 113.105, 113.106, 113.110, 113.120, 113.170, 113.180, 113.190, 113.200, 113.220, 113.230, 113.240, 113.250, 113.260, 113.280, 113.300, 113.320, 113.330, 113.350, 113.380, 113.390, 113.400, 113.420, 113.430, 113.440, 113.500, 113.550, 113.560, 113.600, 113.620, 113.640, 113.650, 113.670, 113.690, 113.700, 113.710, 113.720, 113.730, 113.740, 113.750, 113.770, 113.780, 113.810, 113.840, 113.860, 113.880, 113.890, 113.900, 113.910, 113.920, 113.930, 113.940, 113.960, 113.970, 113.980, 113.990, 113.1000, 113.1010, 113.1030, 113.1040, 113.1060, 113.1070, 113.1080, 113.1090, 113.1100, 113.1110, 113.1120, 113.1140, 113.1150, 113.1160, 113.1170, 113.1180, 113.1190, 113.1200, 113.1210, 113.1220, 113.1230, 113.1250, 113.1260, 113.1270, 113.1280, and 113.1290. The commission also proposes new §§113.870, 113.1130, 113.1390, 113.1400, 113.1410, and 113.1420.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The proposed amendments to Chapter 113 would incorporate amendments that the United States Environmental Protection Agency (EPA) made to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Source Categories, under 40 Code of Federal Regulations (CFR) Part 63 and add six NESHAPs that have not previously been incorporated into Chapter 113.

The proposed amendments to Chapter 113 would incorporate by reference amendments that the EPA made to the NESHAP for Source Categories under 40 CFR Part 63. These are technology-based standards commonly referred to as the maximum achievable control technology (MACT) standards. The MACT standards are required by the Federal Clean Air Act Amendments of 1990 (FCAA), §112, which requires the EPA to develop national technology-based standards for new and existing sources of hazardous air pollutants listed in §112. The MACT standards are generally required to be based on the maximum degree of emission control that is achievable, taking into consideration cost and any non-air quality health and environmental impacts and energy requirements.

In addition, the proposed new sections would incorporate by reference six MACT standards that have not been previously incorporated into Chapter 113. The EPA is developing these national standards to regulate emissions of hazardous air pollutants as required under FCAA, §112, as codified in 42 United States Code (USC), §7412.

Under federal law, affected industries are required to implement the MACT standards regardless of whether the commission or the EPA is the agency responsible for implementation. As MACT standards are promulgated or amended by the EPA, they are reviewed by commission staff for compatibility with current commission regulations and policies. The commission then incorporates them, as appropriate, into Chapter 113 through formal rulemaking procedures. After each MACT standard or amendment is adopted, the commission will seek formal delegation from the EPA under 40 CFR Part 63, Subpart E (Approval of State Programs and Delegation of Federal Authorities), which implements 42 USC, §7412(1). Upon delegation, the commission will be responsible for administering and enforcing the MACT requirements.

The commission proposes to incorporate the following amendments that the EPA has made to the 40 CFR Part 63 General Provisions and 82 of the federal MACT standards previously in-

corporated into the commission rules by updating the federal promulgation dates and *Federal Register* (FR) citations stated in the commission rules, as discussed more specifically in the SECTION BY SECTION discussion in this preamble. The amended standards, along with their corresponding Chapter 113 sections and original incorporation dates, are listed in the following table.

Figure 1: 30 TAC Chapter 113--Preamble

The six recent federal MACT standards not currently included in Chapter 113 that commission is proposing to incorporate by reference without change are summarized in the following table.

Figure 2: 30 TAC Chapter 113--Preamble

SECTION BY SECTION DISCUSSION

§113.100. General Provisions (40 CFR 63, Subpart A).

The commission proposes to amend §113.100 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart A, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart A, on April 15, 2005 (70 FR 19992), December 16, 2005 (70 FR 74870), February 16, 2006 (71 FR 8342), April 20, 2006 (71 FR 20446), November 28, 2006 (71 FR 68750), December 6, 2006 (71 FR 70660), January 3, 2007 (72 FR 26), January 23, 2007 (72 FR 2930), and May 16, 2007 (72 FR 27437). The April 15, 2005, amendments incorporate by reference the ANSI/ASME PTC 19.10-1981, a Flue and Exhaust Gas Analyses. The December 16, 2005, amendments give the new address to purchase material from the American Society of Mechanical Engineers (ASME). A new incorporation by reference of an ASME analysis was also added. The February 16, 2006, amendments incorporate by reference a source sampling method. The April 20, 2006, amendments revised compliance with standards and maintenance requirements, as well as monitoring, recordkeeping, and reporting requirements as they relate to startup, shutdown, and malfunction plans.

The November 28, 2006, amendments incorporate by reference the New Hampshire Regulations Applicable to Hazardous Air Pollutants, September 2006. The December 6, 2006, January 3, 2007, and January 23, 2007 amendments incorporate by reference new test methods. The May 16, 2007, amendments allow for extensions to the deadline to conduct initial or subsequent performance tests due to a force majeure.

§113.105. Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act, §112(j) (40 CFR 63, Subpart B, §§63.50 - 63.56).

The commission proposes to amend §113.105 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart B, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart B, on July 11, 2005 (70 FR 39662). The July 11, 2005, amendments revised Table 1 of 40 CFR Part 63, Subpart B to reflect the revised deadlines in a recently amended consent decree relating to boilers and hydrochloric acid production furnaces that burn hazardous waste.

§113.106. List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List (40 CFR 63, Subpart C).

The commission proposes to amend §113.106 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart C, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart C, on December 19, 2005 (70 FR 75047). The December 19, 2005, amendments revised the list of hazardous air pollutants contained in Federal Clean Air Act, §112 by removing the compound methyl ethyl ketone.

§113.110. Synthetic Organic Chemical Manufacturing Industry (40 CFR 63, Subpart F).

The commission proposes to amend §113.110 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart F, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart F, on April 20, 2006 (71 FR 20446) and December 21, 2006 (71 FR 76614). The April 20, 2006, amendments revised general standards and maintenance wastewater requirements as they relate to startup, shutdown, and malfunction plans. The December 21, 2006, amendments removed methyl ethyl ketone from the Hazardous Organic NESHAP (HON) tables of this subpart.

§113.120. Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater (40 CFR 63, Subpart G).

The commission proposes to amend §113.120 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart G, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart G, on December 23, 2004 (69 FR 76863), April 20, 2006 (71 FR 20446), and December 21, 2006 (71 FR 76603). The December 23, 2004, amendments revised the HON to allow vapor balancing in conjunction with the use of a pressure setting to comply with the storage tank control requirements standards. The April 20, 2006, amendments revised the general reporting and continuous recordkeeping requirements as they relate to startup, shutdown, and malfunction plans. The December 21, 2006, amendments removed methyl ethyl ketone from HON tables and clarified the requirement to redetermine Group status for wastewater streams if process or operational changes occur that could reasonably change the wastewater stream from a Group 2 to a Group 1 stream. In addition, these amendments waived all notification and reporting requirements for owners or operators of facilities where railcars, tank trucks, or barges, which are part of the vapor balancing control option, are reloaded or cleaned. This allows off-site reloading and cleaning operations to comply with monitoring, recordkeeping, and reporting provisions of any other applicable 40 CFR Part 63 standard in lieu of the monitoring, recordkeeping, and reporting in the HON.

§113.170. Coke Oven Batteries (40 CFR 63, Subpart L).

The commission proposes to amend §113.170 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart L, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart L, on April 15, 2005 (70 FR 19992) and April 20, 2006 (71 FR 20446). The April 15, 2005, amendments clarified limits for visible emissions for existing by-product batteries and improved control of charging emissions from a new nonrecovery battery. In addition, these amendments required the owner or operator to implement a work practice standard designed to ensure that the draft on the oven is maximized during charging. The April 20, 2006, amendments revised the definition of malfunction and the requirements for startup, shutdown, and malfunctions.

§113.180. Perchloroethylene Dry Cleaning Facilities (40 CFR 63, Subpart M).

The commission proposes to amend §113.180 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart M, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart M, on December 19, 2005 (70 FR 75320), July 27, 2006 (71 FR 42724), and September 21, 2006 (71 FR 55280). The December 19, 2005, amendments revised the applicability to state that area sources subject to the NESHAP are exempt from the obligation to obtain operating permits under 40 CFR Part 70 (State Operating Permit Programs) or 71 (Federal Operating Permit Programs), unless the source would be required to obtain these permits for another reason, as defined in 40 CFR Part 70 or 71. The July 27, 2006, amendments promulgated revisions to take into account new developments in production practices, processes, and control technologies. In addition, these amendments promulgated more stringent standards for major sources in order to protect public health with an ample margin of safety. The September 21, 2006, amendments corrected a typographical error.

§113.190. Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks (40 CFR 63, Subpart N).

The commission proposes to amend §113.190 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart N, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart N, on December 19, 2005 (70 FR 75320) and April 20, 2006 (71 FR 20446). The December 19, 2005, amendments revised the applicability to state that area sources subject to the NESHAP are exempt from the obligation to obtain operating permits under 40 CFR Part 70 or 71, unless the source would be required to obtain these permits for another reason, as defined in 40 CFR Part 70 or 71. The April 20, 2006, amendments revised standards as they relate to startup, shutdown, and malfunction plans.

§113.200. Ethylene Oxide Emissions Standards for Sterilization Facilities (40 CFR 63, Subpart O).

The commission proposes to amend §113.200 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart O, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart O, on December 19, 2005 (70 FR 75320). The December 19, 2005, amendments revised the applicability to state that area sources subject to the NESHAP are exempt from the obligation to obtain operating permits under 40 CFR Part 70 or 71, unless the source would be required to obtain these permits for another reason, as defined in 40 CFR Part 70 or 71.

§113.220. Industrial Process Cooling Towers (40 CFR 63, Subpart Q).

The commission proposes to amend §113.220 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart Q, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart Q, on April 7, 2006 (71 FR 17738). The April 7, 2006, amendments revised the applicability to provide sources that are operated with chromium-based water treatment chemicals to be subject to the standard.

§113.230. Gasoline Distribution Facilities (40 CFR 63, Subpart R).

The commission proposes to amend §113.230 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart R, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart R, on April 6, 2006 (71 FR 17352). The April 6, 2006, amendments updated reporting and recordkeeping requirements pertaining to annual certification testing and railcar bubble leak testing.

§113.240. Pulp and Paper Industry (40 CFR 63, Subpart S).

The commission proposes to amend §113.240 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart S, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart S, on April 13, 2004 (69 FR 19734). The April 13, 2004, amendments affect a semi-chemical pulp and paper mill located in Tomahawk, Wisconsin.

§113.250. Halogenated Solvent Cleaning (40 CFR 63, Subpart T).

The commission proposes to amend §113.250 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart T, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart T, on December 19, 2005 (70 FR 75320) and May 3, 2007 (72 FR 25138). The December 19, 2005, amendments revised the applicability to state that area sources subject to the NESHAP are exempt from the obligation to obtain operating permits under 40 CFR Part 70 or 71, unless the source would be required to obtain these permits for another reason, as defined in 40 CFR Part 70 or 71. The May 3, 2007, amendments revised the emission limits of methylene chloride, trichloroethylene, and perchloroethylene from facilities engaged in halogenated solvent cleaning. The standards became more stringent to provide an ample margin of safety to protect public health.

§113.260. Group I Polymers and Resins (40 CFR 63, Subpart U).

The commission proposes to amend §113.260 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart U, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart U, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general recordkeeping and reporting provisions as they relate to startup, shutdown, and malfunction plans.

§113.280. Epoxy Resins Production and Non-Nylon Polyamides Production (40 CFR 63, Subpart W).

The commission proposes to amend §113.280 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart W, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart W, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the monitoring requirements as they relate to startup, shutdown, and malfunctions.

§113.300. Marine Vessel Loading (40 CFR 63, Subpart Y).

The commission proposes to amend §113.300 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart Y, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart Y, on April 20, 2006 (71 FR 20446). The April

20, 2006, amendments revised standards to require an operation and maintenance plan to be written.

§113.320. Phosphoric Acid Manufacturing Plants (40 CFR 63, Subpart AA).

The commission proposes to amend §113.320 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart AA, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart AA, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the applicability as it relates to startup, shutdown, and malfunctions.

§113.330. Phosphate Fertilizers Production Plants (40 CFR 63, Subpart BB).

The commission proposes to amend §113.330 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart BB, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart BB, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the applicability as it relates to startup, shutdown, and malfunctions.

§113.350. Off-Site Waste and Recovery Operations (40 CFR 63, Subpart DD).

The commission proposes to amend §113.350 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart DD, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart DD, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the inspection and monitoring requirements as they relate to startup, shutdown, and malfunctions.

§113.380. Aerospace Manufacturing and Rework Facilities (40 CFR 63, Subpart GG).

The commission proposes to amend §113.380 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart GG, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart GG, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general standards as they relate to startup, shutdown, and malfunctions.

§113.390. Oil and Natural Gas Production Facilities (40 CFR 63, Subpart HH).

The commission proposes to amend §113.390 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart HH, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart HH, on April 20, 2006 (71 FR 20446) and January 3, 2007 (72 FR 26). The April 20, 2006, amendments revised the inspection and monitoring requirements and general provisions as they relate to startup, shutdown, and malfunctions. The January 3, 2007, amendments revised the applicability and designation of affected source, definitions, standards, test methods, compliance procedures, compliance demonstrations, and recordkeeping and reporting requirements to reflect that oil and natural gas production is identified as an area source category under FCAA, §112(c)(3).

§113.400. Shipbuilding and Ship Repair (Surface Coating) (40 CFR 63, Subpart II).

The commission proposes to amend §113.400 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart II, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart II, on December 29, 2006 (71 FR 78369). The December 29, 2006, amendments revised and added new definitions and eliminated the term "pleasure craft." These amendments also excluded those coating activities that are subject to emission limitations or work practices under the NESHAP for boat manufacturing and they amended the compliance period for shipbuilding and ship operations.

§113.420. Printing and Publishing (40 CFR 63, Subpart KK).

The commission proposes to amend §113.420 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart KK, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart KK, on May 24, 2006 (71 FR 29792). The May 24, 2006, amendments revised the applicability, which includes a provision for some sources to establish and maintain themselves as area sources of HAP with respect to this NESHAP. These amendments also provided an option for including stand-alone coating equipment and revised definitions, standards, performance test methods, and monitoring, recordkeeping and reporting requirements.

§113.430. Primary Aluminum Reduction Plants (40 CFR 63, Subpart LL).

The commission proposes to amend §113.430 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart LL, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart LL, on November 2, 2005 (70 FR 66280) and April 20, 2006 (71 FR 20446). The November 2, 2005, amendments revised the emission limit for polycyclic organic matter applicable to one potline subcategory. The amendments also revised the compliance provisions to clarify the dates which all plants must meet the NESHAP requirements and to specify the time allowed to demonstrate initial compliance for a new or reconstructed potline, anode bake furnace, or pitch storage tank, as well as an existing potline or anode bake furnace that has been shutdown and subsequently restarted. The April 20, 2006, amendments revised the emission monitoring requirements, as well as the notification, reporting and recordkeeping requirements as they relate to startup, shutdown, and malfunctions.

§113.440. Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills (40 CFR 63, Subpart MM).

The commission proposes to amend §113.440 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart MM, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart MM, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the monitoring and recordkeeping requirements as they relate to startup, shutdown, and malfunctions.

§113.500. Closed Vent Systems, Control Devices, Recovery Devices, and Routing to a Fuel Gas System or a Process (40 CFR 63, Subpart SS).

The commission proposes to amend §113.500 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart SS, made by the EPA since this section was last

amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart SS, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the recordkeeping requirements as they relate to startup, shutdown, and malfunctions.

§113.550. Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations (40 CFR 63, Subpart XX).

The commission proposes to amend §113.550 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart XX, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart XX, on April 13, 2005 (70 FR 19266). The April 13, 2005, amendments clarified the compliance requirements for benzene waste streams and the requirements for heat exchangers and heat exchanger systems. These amendments also stipulate the provisions for off-site waste transfer.

§113.560. Generic Maximum Achievable Control Technology Standards (40 CFR 63, Subpart YY).

The commission proposes to amend §113.560 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart YY, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart YY, on April 13, 2005 (70 FR 19266) and April 20, 2006 (71 FR 20446). The April 13, 2005, amendments corrected the regulatory language that made emissions from ethylene cracking furnaces during decoking operations an exception to the provisions. These amendments also delineate overlapping requirements for storage vessels and transfer racks. The April 20, 2006, amendments revised the definition of malfunction and requirements as they relate to startup, shutdown, and malfunctions.

§113.600. Steel Pickling - HCl Process Facilities and Hydrochloric Acid Regeneration Plants (40 CFR 63, Subpart CCC).

The commission proposes to amend §113.600 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart CCC, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart CCC, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the reporting requirements as they relate to startup, shutdown, and malfunctions.

§113.620. Hazardous Waste Combustors (40 CFR 63, Subpart EEE).

The commission proposes to amend §113.620 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart EEE, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart EEE, on October 12, 2005 (70 FR 59402), April 20, 2006 (71 FR 20446), and October 25, 2006 (71 FR 62388). The October 12, 2005, amendments implement FCAA, §112(d) by requiring hazardous waste combustors to meet HAP emission standards reflecting the performance of the MACT. The April 20, 2006, amendments revised the compliance requirements as they relate to startup, shutdown, and malfunctions. The October 25, 2006, amendments suspend the obligation of new cement kilns to comply with the particulate matter standard until the EPA takes final action on the proposal.

§113.640. Pharmaceuticals Production (40 CFR 63, Subpart GGG).

The commission proposes to amend §113.640 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart GGG, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart GGG, on May 13, 2005 (70 FR 25666) and April 20, 2006 (71 FR 20446). The May 13, 2005, amendments added a reference to an existing generic standard as a compliance alternative for large wastewater containers; applied the same planned routine maintenance provisions for storage tanks to wastewater tanks; allowed monitoring of the condenser product side temperature in lieu of the exit gas temperature; and allowed monitoring of caustic strength of the scrubber effluent as an alternative to measuring pH. The April 20, 2006, amendments revised the definition of malfunction. The wastewater standards, monitoring requirements, and recordkeeping requirements were also amended, requiring a startup, shutdown, and malfunction plan.

§113.650. Natural Gas Transmission and Storage Facilities (40 CFR 63, Subpart HHH).

The commission proposes to amend §113.650 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart HHH, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart HHH, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the inspection and monitoring requirements, as well as the general provisions as they relate to startup, shutdown, and malfunctions.

§113.670. Group IV Polymers and Resins (40 CFR 63, Subpart JJJ).

The commission proposes to amend §113.670 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart JJJ, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart JJJ, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general recordkeeping and reporting provisions requiring a startup, shutdown, and malfunction plan.

§113.690. Portland Cement Manufacturing Industry (40 CFR 63, Subpart LLL).

The commission proposes to amend §113.690 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart LLL, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart LLL, on December 20, 2006 (71 FR 76518). The December 20, 2006, amendments revised the standards and operating limits for kilns and in-line kiln/raw mills. The amendments also revised the standards for new or reconstructed raw material dryers and updated the performance testing requirements, monitoring and recordkeeping requirements, and compliance dates.

§113.700. Pesticide Active Ingredient Production (40 CFR 63, Subpart MMM).

The commission proposes to amend §113.700 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart MMM, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart MMM, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the definition of malfunction. These amendments also revised the monitoring, inspec-

tion, and recordkeeping provisions by requiring a startup, shutdown, and malfunction plan.

§113.710. Wool Fiberglass Manufacturing (40 CFR 63, Subpart NNN).

The commission proposes to amend §113.710 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart NNN, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart NNN, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the standards requiring an operation and maintenance plan to be written.

§113.720. Manufacture of Amino/Phenolic Resins (40 CFR 63, Subpart OOO).

The commission proposes to amend §113.720 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart OOO, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart OOO, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the definition of malfunction. These amendments also revised the compliance and recordkeeping requirements as they relate to startup, shutdown, and malfunctions.

§113.730. Polyether Polyols Production (40 CFR 63, Subpart PPP).

The commission proposes to amend §113.730 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart PPP, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart PPP, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general recordkeeping and reporting provisions as they relate to startup, shutdown, and malfunctions.

§113.740. Primary Copper Smelting (40 CFR 63, Subpart QQQ).

The commission proposes to amend §113.740 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart QQQ, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart QQQ, on July 14, 2005 (70 FR 40672) and April 20, 2006 (71 FR 20446). The July 14, 2005, amendments corrected the monitoring requirements for control systems other than baghouses and venturi wet scrubbers. The April 20, 2006, amendments revised requirements as they relate to startup, shutdown, and malfunctions.

§113.750. Secondary Aluminum Production (40 CFR 63, Subpart RRR).

The commission proposes to amend §113.750 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart RRR, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart RRR, on September 3, 2004 (69 FR 53980), October 3, 2005 (70 FR 57513), December 19, 2005 (70 FR 75320), and April 20, 2006 (71 FR 20446). The September 3, 2004, amendments clarify regulatory text, correct errors, and improve understanding of the rule requirements. The definitions were revised by deleting the definition of internal runaround replacing it with a definition of runaround scrap, and revising the definition of "T_i" to state the proper units. These amendments included units for emissions of dioxin/furans (D/F) to clarify that the requirements for measurement of feed/charge weight apply to facilities subject to emission limits for D/F, as well as emission limits for other pollutants. The September 3, 2004, amendments also revised the operating requirements for dross-only furnaces to be consistent with the definition for this type of furnace. Equation 7 in §63.1513 was amended to apply only to particulate matter and hydrogen chloride emissions and a separate equation for computing D/F emissions was added in the appropriate measurement units for the standard. The requirements for the semiannual excess emission/summary reports were also amended.

The October 3, 2005, amendments corrected a punctuation error in the definition of clean charge, and a typographical error in the operating temperature of a scrap dryer/delacquering kiln/decoating kiln afterburner. The December 19, 2005, amendments revised the applicability to state that area sources subject to the NESHAP are exempt from the obligation to obtain operating permits under 40 CFR Part 70 or 71, unless the source would be required to obtain these permits for another reason, as defined in 40 CFR Part 70 or 71. The April 20, 2006, amendments revised the reporting requirements as they relate to startup, shutdown, and malfunction plans.

§113.770. Primary Lead Smelting (40 CFR 63, Subpart TTT).

The commission proposes to amend §113.770 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart TTT, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart TTT, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the definition of malfunction. In addition, the monitoring requirements were amended as they relate to startup, shutdown, and malfunctions.

§113.780. Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units (40 CFR 63, Subpart UUU).

The commission proposes to amend §113.780 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart UUU, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart UUU, on February 9, 2005 (70 FR 6930) and April 20, 2006 (71 FR 20446). The February 9, 2005, amendments revised the affected source designations and added new compliance options for catalytic reforming units that use different types of emission control systems. These amendments added new monitoring alternatives for catalytic cracking units and catalytic reforming units, and a new procedure for determining the metal or total chloride concentration on catalyst particles. The February 9, 2005, amendments also deferred technical requirements for most continuous parameter monitoring systems. In addition, these amendments clarified the testing and monitoring requirements, and included editorial corrections. The April 20, 2006, amendments revised the general requirements as they relate to startup, shutdown, and malfunctions.

§113.810. Ferroalloys Production: Ferromanganese and Silicomanganese (40 CFR 63, Subpart XXX).

The commission proposes to amend §113.810 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart XXX, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart XXX, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the definition of malfunction. The amendments also revised performance testing, test methods and compliance demonstrations relating to startup, shutdown, and malfunctions.

§113.840. Municipal Solid Waste Landfills (40 CFR 63, Subpart AAAA).

The commission proposes to amend §113.840 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart AAAA, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart AAAA, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the compliance determination and deviation requirements as they relate to startup, shutdown, and malfunction plans.

§113.860. Manufacturing of Nutritional Yeast (40 CFR 63, Subpart CCCC).

The commission proposes to amend §113.860 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart CCCC, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart CCCC, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general requirements as they relate to startup, shutdown, and malfunctions.

§113.870. Plywood and Composite Wood Products (40 CFR 63, Subpart DDDD).

The commission proposes new §113.870 by incorporating by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart DDDD, adopted by the EPA on July 30, 2004 (69 FR 45944), as amended on February 16, 2006 (71 FR 8342) and April 20, 2006 (71 FR 20446). This MACT standard regulates HAP emissions from plywood and composite wood product facilities and sawmills with lumber kilns that are major sources. HAPs emitted from these facilities include: acetaldehyde, acrolein, formaldehyde, methanol, phenol, and propionaldehyde.

The February 16, 2006, amendments addressed a petition for reconsideration of certain provisions, and amended the applicability, general requirements, and definitions. The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunction plans.

§113.880. Organic Liquids Distribution (Non-Gasoline) (40 CFR 63, Subpart EEEE).

The commission proposes to amend §113.880 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart EEEE, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart EEEE, on April 20, 2006 (71 FR 20446) and July 28, 2006 (71 FR 42898). The April 20, 2006, amendments revised the general requirements and provisions as they relate to startup, shutdown, and malfunctions. The July 28, 2006, amendments provided an additional, equivalent control option that allows routing of displaced HAP vapors to a storage tank with a common header. An option was added to allow vapor balancing back to transport vehicle for storage tanks when they are being filled with organic liquids. A compliance date extension was added for all storage tanks. These amendments also revised the recordkeeping and reporting requirements for emissions sources that do not require control.

§113.890. Miscellaneous Organic Chemical Manufacturing (40 CFR 63, Subpart FFFF).

The commission proposes to amend §113.890 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart FFFF, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart FFFF, on July 1, 2005 (70 FR 38554), March 1, 2006 (71 FR 10439), April 20, 2006 (71 FR 20446), and July 14, 2006 (71 FR 40316). The July 1, 2005, amendments clarified the compliance requirements for flares and the alternative standards, which limit the outlet concentration to 20 parts per million. These amendments also extend the vapor balancing alternative to cover transfers from barges to storage tanks and amended the procedures for correcting measured concentrations at the outlet of combustion devices to correct for dilution by supplemental gas. The July 1, 2005, amendments also clarified the signature requirements for the notification of compliance status report.

The March 1, 2006, amendments extended the compliance date for existing sources by 18 months. The April 20, 2006, amendments revised the general provisions as they relate to startup, shutdown, and malfunction plans. The July 14, 2006, amendments clarify the applicability of MACT FFFF, provide additional compliance options, modify initial and continuous compliance requirements, and simplify the recordkeeping and reporting requirements. These provisions will reduce the burden associated with demonstrating compliance without affecting emissions control or the ability of enforcement agencies to ensure compliance.

§113.900. Solvent Extraction for Vegetable Oil Production (40 CFR 63, Subpart GGGG).

The commission proposes to amend §113.900 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart GGGG, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart GGGG, on September 1, 2004 (69 FR 53338) and April 20, 2006 (71 FR 20446). The September 1, 2004, amendments revised the compliance requirements for vegetable oil production processes that exclusively use a qualifying low-HAP extraction solvent. The April 20, 2006, amendments revised definitions and compliance with HAP emission standards. These amendments also required a startup, shutdown, and malfunction plan.

§113.910. Wet-Formed Fiberglass Mat Production (40 CFR 63, Subpart HHHH).

The commission proposes to amend §113.910 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart HHHH, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart HHHH, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the operating limits and required a startup, shutdown, and malfunction plan.

§113.920. Surface Coating of Automobiles and Light-Duty Trucks (40 CFR 63, Subpart IIII).

The commission proposes to amend §113.920 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart IIII, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart IIII, on April 20, 2006 (71 FR 20446), December 22, 2006 (71 FR 76922), and April 24, 2007 (72 FR 20227). The April 20, 2006, amendments revised the general requirements and added requirements for demonstrating compliance relating to startup, shutdown, and malfunctions. The December 22, 2006, amendments allowed the owner or operator of an automobile and light-duty coating affected source to include in that affected source any coating operation which applies coatings to parts intended for use in new automobiles, new light-duty trucks, or aftermarket repair or replacement parts for automobiles or

light-duty trucks which would otherwise be subject to the Miscellaneous Metal Part NESHAP or the Plastic Parts NESHAP. These amendments also added an option to include the coating of heavier vehicle bodies, body parts for heavier vehicles, and parts for heavier vehicles in the affected source under this NESHAP. The April 24, 2007, amendments revised the applicability, recordkeeping requirements, determination of initial compliance, and definitions.

§113.930. Paper and Other Web Coating (40 CFR 63, Subpart JJJJ).

The commission proposes to amend §113.930 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart JJJJ, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart JJJJ, on May 24, 2006 (71 FR 29792). The May 24, 2006, amendments revised what is subject to this subpart by including any web coating lines.

§113.940. Surface Coating of Metal Cans (40 CFR 63, Subpart KKKK).

The commission proposes to amend §113.940 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart KKKK, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart KKKK, on January 6, 2006 (71 FR 1378) and April 20, 2006 (71 FR 20446). The January 6, 2006, amendments updated operating limits to state that new and reconstructed sources must meet the operating limits at all times after they have been established during the performance test, and existing sources must meet the operating limits at all times after the compliance date of November 13, 2006. These amendments also added the phrase "considering controls" to the description of major source of HAP emissions and all required calculations. In addition, all compliance demonstrations may be performed using either metric or English units. The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.960. Surface Coating of Miscellaneous Metal Parts and Products (40 CFR 63, Subpart MMMM)

The commission proposes to amend §113.960 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart MMMM, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart MMMM, on April 20, 2006 (71 FR 20446) and December 22, 2006 (71 FR 76927). The April 20, 2006, amendments revised the general requirements as they relate to startup, shutdown, and malfunctions. The December 22, 2006, amendments allowed the coating of heavier vehicle bodies, metal body parts for heavier vehicles, and other metal parts for heavier vehicles to comply with the Automobiles and Light-Duty Trucks NESHAP in lieu of complying with the Miscellaneous Metal Part NESHAP.

§113.970. Surface Coating of Large Appliances (40 CFR 63, Subpart NNNN).

The commission proposes to amend §113.970 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart NNNN, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart NNNN, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.980. Printing, Coating, and Dyeing of Fabrics and Other Textiles (40 CFR 63, Subpart OOOO)

The commission proposes to amend §113.980 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart OOOO, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart OOOO, on August 4, 2004 (69 FR 47001), April 20, 2006 (71 FR 20446), and May 24, 2006 (71 FR 29792). The August 4, 2004, amendments revised the standards to clarify the applicability of the Fabric NESHAP to coating, slashing, dyeing, or finishing operations at synthetic fiber manufacturing facilities where the fibers are the final product of the facility. The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions. The May 24, 2006, amendments revised what is subject to the subpart to include any web coating lines.

§113.990. Surface Coating of Plastic Parts and Products (40 CFR 63, Subpart PPPP).

The commission proposes to amend §113.990 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart PPPP, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart PPPP, on April 20, 2006 (71 FR 20446), December 22, 2006 (71 FR 76827), and April 24, 2007 (72 FR 20227). The April 20, 2006, amendments revised the general requirements as they relate to startup, shutdown, and malfunctions. The December 22, 2006, amendments allow the coating of heavier plastic vehicle bodies, plastic body parts for heavier vehicles, and other plastic parts for heavier vehicles to comply with the Automobiles and Light-Duty Trucks NESHAP in lieu of the Plastic Parts NESHAP. The April 24, 2007, amendments revised the applicability to not allow screen printing.

§113.1000. Surface Coating of Wood Building Products (40 CFR 63, Subpart QQQQ).

The commission proposes to amend §113.1000 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart QQQQ, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart QQQQ, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1010. Surface Coating of Metal Furniture (40 CFR 63, Subpart RRRR).

The commission proposes to amend §113.1010 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart RRRR, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart RRRR, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general provisions as they relate to startup, shutdown, and malfunction plans.

§113.1030. Leather Finishing Operations (40 CFR 63, Subpart TTTT).

The commission proposes to amend §113.1030 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart TTTT, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part

63, Subpart TTTT, on February 7, 2005 (70 FR 6355). The February 7, 2005, amendments clarify the frequency for categorizing leather product process types, modify the definition of specialty leather, add a definition for vacuum mulling, and add an alternative procedure for determining the actual monthly solvent loss from an affected source.

§113.1040. Cellulose Products Manufacturing (40 CFR 63, Subpart UUUU).

The commission proposes to amend §113.1040 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart UUUU, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart UUUU, on June 24, 2005 (70 FR 36523), August 10, 2005 (70 FR 46684) and April 20, 2006 (71 FR 20446). The June 24, 2005, amendments correct the date in the definition of a process change that was included in the final rule. The August 10, 2005, amendments revise the work practice standards, general and initial compliance requirements, definitions, and general provisions applicability, as well as correct typographical, formatting, and cross-referencing errors. The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1060. Reinforced Plastic Composites Production (40 CFR 63, Subpart WWWW).

The commission proposes to amend §113.1060 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart WWWW, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart WWWW, on August 25, 2005 (70 FR 50118) and April 20, 2006 (71 FR 20446). The August 25, 2005, amendments revise compliance options for open molding, correct errors, and add clarification to sections of the rule. The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1070. Rubber Tire Manufacturing (40 CFR 63, Subpart XXXX).

The commission proposes to amend §113.1070 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart XXXX, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart XXXX, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general requirements as they relate to startup, shutdown, and malfunctions.

§113.1080. Stationary Combustion Turbines (40 CFR 63, Subpart YYYY).

The commission proposes to amend §113.1080 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart YYYY, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart YYYY, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1090. Stationary Reciprocating Internal Combustion Engines (40 CFR 63, Subpart ZZZZ).

The commission proposes to amend §113.1090 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart ZZZZ, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart ZZZZ, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1100. Lime Manufacturing Plants (40 CFR 63, Subpart AAAAA).

The commission proposes to amend §113.1100 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart AAAAA, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart AAAAA, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1110. Semiconductor Manufacturing (40 CFR 63, Subpart BBBBB).

The commission proposes to amend §113.1110 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart BBBBB, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart BBBBB, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general provisions as they relate to startup, shutdown, and malfunction plans.

§113.1120. Coke Ovens: Pushing, Quenching, and Battery Stacks (40 CFR 63, Subpart CCCCC).

The commission proposes to amend §113.1120 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart CCCCC, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart CCCCC, on October 13, 2004 (69 FR 60813), August 2, 2005 (70 FR 44285), and April 20, 2006 (71 FR 20446). The October 13, 2004, amendments revised the parametric operating limits and associated compliance provisions for capture systems used to control emissions from pushing. The October 13, 2004, amendments also amend the requirements for mobile scrubber cars that capture emissions which occur during pushing and travel. The operating limit was amended to state that the requirement applies to capture systems that use an electric motor to drive the fan. These amendments also added requirements for demonstrating initial and continuous compliance with the new operating limit for daily average static pressure or fan revolutions per minute. The provision to complete all repairs within 30 days after the defect or deficiency is found was replaced.

The August 2, 2005, amendments required a plant owner or operator to complete repairs within 30 days after the date that the defect or deficiency is discovered. In addition, the August 2, 2005, amendments clarified some sampling procedures. The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1130. Industrial, Commercial and Institutional Boilers and Process Heaters (40 CFR 63, Subpart DDDDD).

The commission proposes new §113.1130 by incorporating by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart DDDDD, adopted by the EPA on September 13, 2004 (69 FR 55218), as amended on December 28, 2005 (70 FR 76918), April 20, 2006 (71 FR 20446), and December 6, 2006 (71 FR 70651). This MACT standard regulates HAP emissions from industrial, commercial, and institutional boilers

and process heaters. HAPs emitted from these facilities include: arsenic, cadmium, chromium, hydrogen chloride, hydrogen fluoride, lead, manganese, mercury, nickel and various organic HAP.

The December 28, 2005, amendments clarified the process for demonstrating eligibility to comply with the health-based compliance alternatives contained in the rule. The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions. The December 6, 2006, amendments improved and clarified the procedures for implementing the emissions averaging provision and for conducting compliance testing when boilers are vented to a common stack. In addition, some definitions were clarified and amendments to the emission averaging provision were made.

§113.1140. Iron and Steel Foundries (40 CFR 63, Subpart EEEEE).

The commission proposes to amend §113.1140 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart EEEEE, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart EEEEE, on May 20, 2005 (70 FR 29400) and April 20, 2006 (71 FR 20446). The May 20, 2005, amendments clarify that the scrap requirements apply to each type of scrap material received or each scrap storage area, pile, or bin as long as the scrap material subject to certification requirements remains segregated from scrap material subject to selection/inspection plans. The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1150. Integrated Iron and Steel Manufacturing Facilities (40 CFR 63, Subpart FFFFF).

The commission proposes to amend §113.1150 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart FFFFF, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart FFFFF, on April 20, 2006 (71 FR 20446) and July 13, 2006 (71 FR 39579). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions. The July 13, 2006, amendments added a new compliance option, revised emission limitations, reduced the frequency of repeat performance tests for certain emission units, added corrective action requirements, and clarified monitoring, recordkeeping, and reporting requirements.

§113.1160. Site Remediation (40 CFR 63, Subpart GGGGG).

The commission proposes to amend §113.1160 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart GGGGG, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart GGGGG, on April 20, 2006 (71 FR 20446) and November 29, 2006 (71 FR 69011). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions. The November 29, 2006, amendments revised the major source determination requirements used for determining the applicability for certain facilities involved with oil and natural gas production. These amendments clarified how the 1 megagram applicability exemption is to be applied at a facility, and clarified the intent for application of the 30-day site remediation exemption, including those situations when the remediation material is transferred off-site. The November 29, 2006, amendments also revised the applicable regulatory language referring to the point at which the facility owner or operator determines the average volatile organic HAP concentration of a remediation material and added a compliance option.

§113.1170. Miscellaneous Coating Manufacturing (40 CFR 63, Subpart HHHHH).

The commission proposes to amend §113.1170 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart HHHHH, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart HHHHH, on May 13, 2005 (70 FR 25666), December 21, 2005 (70 FR 75924), April 20, 2006 (71 FR 20446), and October 4, 2006 (71 FR 58499). The May 13, 2005, amendments were as follows: added a reference to an existing general standard as a compliance alternative for large wastewater containers; applied the same planned routine maintenance provisions for storage tanks to wastewater tanks; allowed monitoring of the condenser product side temperature in lieu of the exit gas temperature; and allowed monitoring of caustic strength of the scrubber effluent as an alternative to measuring pH.

The December 21, 2005, amendments specified that certain raw material formulation data as supplied to coating manufacturers may be used to demonstrate compliance with the weight percent HAP limit. The April 20, 2006, amendments revised the general provisions as they relate to startup, shutdown, and malfunction plans. The October 4, 2006, amendments clarify that coating manufacturing means the production of coatings using operations such as mixing and blending, not reaction or separation processes used in chemical manufacturing. These amendments extend the compliance date for certain coating manufacturing equipment that is also part of a chemical manufacturing process unit. In addition, the October 4, 2006, amendments clarified that operations by end users that modify a purchased coating prior to application at the purchasing facility are exempt.

§113.1180. Mercury Emissions from Mercury Cell Chlor-Alkali Plants (40 CFR 63, Subpart IIIII).

The commission proposes to amend §113.1180 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart IIIII, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart IIIII, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1190. Brick and Structural Clay Products Manufacturing (40 CFR 63, Subpart JJJJJ).

The commission proposes to amend §113.1190 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart JJJJJ, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart JJJJJ, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1200. Clay Ceramics Manufacturing (40 CFR 63, Subpart KKKKK).

The commission proposes to amend §113.1200 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart KKKKK, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart KKKKK, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance

requirements as they relate to startup, shutdown, and malfunctions.

§113.1210. Asphalt Processing and Asphalt Roofing Manufacturing (40 CFR 63, Subpart LLLLL).

The commission proposes to amend §113.1210 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart LLLLL, made by the EPA since this section was last amended. During this time frame, the EPA amended 40 CFR Part 63, Subpart LLLLL, on May 17, 2005 (70 FR 28360) and April 20, 2006 (71 FR 20446). The May 17, 2005, amendments included correction of errors in definitions and equations and added language to one other provision so that the rule language conforms to the preamble discussion to the final rule. The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1220. Flexible Polyurethane Foam Fabrication Operations (40 CFR 63, Subpart MMMMM).

The commission proposes to amend §113.1220 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart MMMMM, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart MMMMM, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1230. Hydrochloric Acid Production (40 CFR 63, Subpart NNNNN).

The commission proposes to amend §113.1230 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart NNNNN, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart NNNNN, on April 7, 2006 (71 FR 17738) and April 20, 2006 (71 FR 20446). The April 7, 2006, amendments completed the following: updated applicability provisions; revised definitions; and updated emission standards, storage tank maintenance, notification and reporting requirements, and monitoring and leak detection and repair plans. The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1250. Engine Test Cells/Stands (40 CFR 63, Subpart PPPPP).

The commission proposes to amend §113.1250 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart PPPPP, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart PPPPP, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1260. Friction Materials Manufacturing Facilities (40 CFR 63, Subpart QQQQQ).

The commission proposes to amend §113.1260 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart QQQQQ, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart QQQQQ, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1270. Taconite Iron Ore Processing (40 CFR 63, Subpart RRRRR).

The commission proposes to amend §113.1270 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart RRRRR, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart RRRRR, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1280. Refractory Products Manufacturing (40 CFR 63, Subpart SSSSS).

The commission proposes to amend §113.1280 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart SSSSS, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart SSSSS, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1290. Primary Magnesium Refining (40 CFR 63, Subpart TTTTT).

The commission proposes to amend §113.1290 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart TTTTT, made by the EPA since this section was adopted. During this time frame, the EPA amended 40 CFR Part 63, Subpart TTTTT, on April 20, 2006 (71 FR 20446). The April 20, 2006, amendments revised the general and compliance requirements as they relate to startup, shutdown, and malfunctions.

§113.1390. Polyvinyl Chloride and Copolymers Production Area Sources (40 CFR 63, Subpart DDDDDD).

The commission proposes new §113.1390 by incorporating by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart DDDDDD, adopted by the EPA on January 23, 2007 (72 FR 2930). This MACT standard regulates HAP emissions for polyvinyl chloride and copolymers production area sources. The HAP emitted from these facilities is vinyl chloride.

§113.1400. Primary Copper Smelting Area Sources (40 CFR 63, Subpart EEEEEE).

The commission proposes new §113.1400 by incorporating by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart EEEEEE, adopted by the EPA on January 23, 2007 (72 FR 2930). This MACT standard regulates HAP emissions for primary copper smelting area sources. HAPs emitted from these facilities include: arsenic, cadmium, chromium, lead, and nickel.

§113.1410. Secondary Copper Smelting Area Sources (40 CFR 63, Subpart FFFFFF).

The commission proposes new §113.1410 by incorporating by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart FFFFFF, adopted by the EPA on January 23, 2007 (72 FR 2930). This MACT standard regulates HAP emissions for secondary copper smelting area sources. HAPs emitted from these facilities include: cadmium, lead, and dioxin.

§113.1420. Primary Nonferrous Metals Area Sources - Zinc, Cadmium, and Beryllium (40 CFR 63, Subpart GGGGGG).

The commission proposes new §113.1420 by incorporating by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart GGGGGG, adopted by the EPA on January 23, 2007 (72 FR 2930). This MACT standard regulates HAP emissions for primary nonferrous metals area sources that produce zinc, cadmium or beryllium. HAPs emitted from these facilities include: arsenic, cadmium, lead, manganese, and nickel.

In addition, non-substantive, administrative revisions were made to Chapter 113.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules would amend Chapter 113 of 30 Texas Administrative Code (TAC) to incorporate recent amendments made by the Environmental Protection Agency (EPA) to the maximum achievable control technology (MACT) standards in 40 Code of Federal Regulations (40 CFR) Part 63.

The EPA amended 82 existing MACT standards and adopted six new MACT standards. The new and amended federal rules need to be incorporated by reference into 30 TAC Chapter 113 in order to: avoid inconsistency between the federal and state MACT standards; allow the agency to enforce MACT standards prior to receiving formal delegation authority for the new standards; maintain existing delegation; and facilitate delegation of authority for six new MACT standards from the EPA. The six new MACT standards will affect the following industries: sawmills with lumber kilns and hardwood/softwood plywood and veneer plants; any industry using a boiler or process heater; area source facilities that polymerize vinyl chloride monomer to produce vinyl chloride and/or copolymer products; area source facilities that produce copper from copper sulfide ore concentrates using pyrometallurgical techniques; area source facilities that process copper scrap in a blast furnace and converter or use another pyrometallurgical purification process to produce anode copper from copper scrap; area source facilities that produce zinc, zinc oxide, cadmium, or cadmium oxide from zinc sulfide ore concentrates using pyrometallurgical techniques; and area source facilities that produce beryllium metal, alloy, or oxide from beryllium ore. Entities and sources affected by the MACT amendments are already complying with the requirements and no significant fiscal implications are anticipated because of their incorporation into state rules.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be increased consistency between federal and state air quality regulations. Entities and sources affected by the MACT amendments are already complying with federal requirements and no significant fiscal implications are anticipated because of their incorporation into state rules.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are expected for small or micro-businesses as a result of the proposed rules. A small business is defined as having fewer than 100 employees or less than $1 million in annual gross receipts. A micro-business is defined as having no more than 20 employees. Small businesses are already being required to comply with MACT standards and should not experience any fiscal implications due to their incorporation into state rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of these proposed rules is to adopt NESHAPs for source categories mandated by 42 USC, §7412 and required to be included in operating permits by 42 USC, §7661a. These NESHAPs are technology based standards commonly referred to as MACT standards which the EPA develops to regulate emissions of hazardous air pollutants as required under the FCAA. Certain sources of hazardous air pollutants will be affected and are required to comply with federal standards whether or not the commission adopts the standards or takes delegation from the EPA. As discussed in the FISCAL NOTE portion of this preamble, the proposed rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with federal MACT standards, and will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

Under 42 USC, §7661a, states are required to have federal operating permit programs that provide authority to issue permits and assure compliance with each applicable standard, regulation or requirement under the FCAA, including NESHAPs, which are required under 42 USC, §7412. Similar to requirements in 42 USC, §7410, regarding the requirement to adopt and implement plans

to attain and maintain the National Ambient Air Quality Standards (NAAQS), states are not free to ignore requirements in 42 USC, §7661a, and must develop and submit programs to provide for operating permits for major sources that include all applicable requirements of the FCAA.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th legislative session. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission in order to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the proposed rules do not modify the federal NESHAP, but are incorporations by reference, which do not change the federal requirements.

For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially un-amended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of §2001.0225.

The proposed rules implement requirements of the FCAA. The MACT standards being incorporated into state law are federal technology-based standards that are required by 42 USC §7412, required to be included in permits under 42 USC §7661a, proposed to be adopted by reference without modification or substitution, and will not exceed any standard set by state or federal law. These rules are not an express requirement of state law. The proposed rules do not exceed a requirement of a delegation agreement or a contract between state and federal government, as the EPA will delegate the MACTs to Texas in accord with the delegation procedures codified in 40 CFR Part 63, if this rulemaking is adopted. The amendments were not developed solely under the general powers of the agency, but are authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, and 382.017.

Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole, or in part, or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to adopt NESHAPs for source categories mandated by 42 USC, §7412 and required to be included in operating permits by 42 USC, §7661a and facilitate implementation and enforcement of the NESHAPs

by the state. The proposed rules will not create any additional burden on private real property. Under federal law, the affected industries will be required to comply with the NESHAPs regardless of whether the commission or the EPA is the agency responsible for implementation of the NESHAPs. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules are to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. The CMP policy applicable to the proposed rules is Emission of Air Pollutants. These rules are consistent because they only incorporate by reference the federal MACT standards that pertain to certain industries and processes. The MACT standards provide the highest level of control of air emissions that is achievable taking into consideration cost and any non-air quality health and environmental impacts and energy requirements.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 113 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed rules are adopted, owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permits to include the new Chapter 113 requirements.

ANNOUNCEMENT OF PUBLIC HEARING

A public hearing on this proposal will be held in Austin on September 18, 2007, at 10:00 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services, at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments submitted via the eComments system. All comments should reference Rule Project Number 2007-012-113-PR. The comment period closes September 24, 2007. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Beryl Thatcher, Air Permits Division, (512) 239-5374.

STATUTORY AUTHORITY

The amended and new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act. The new and amended sections are also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning the State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants; and §382.051, concerning Permitting Authority of the Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the Texas Clean Air Act.

The proposed new and amended sections implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051.

§113.100. General Provisions (40 Code of Federal Regulations Part 63, Subpart A).

The General Provisions for the National Emission Standards for Hazardous Air Pollutants for Source Categories as specified in 40 Code of Federal Regulations (CFR) Part 63, Subpart A, are incorporated by reference as amended through May 16, 2007 (72 FR 27437) [~~June 15, 2004 (69 FR 33506)~~] with the following exceptions.

(1) - (7) (No change.)

§113.105. Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act, §112(j) (40 Code of Federal Regulations Part 63, Subpart B, §§63.50 - 63.56).

The Requirements for Control Technology Determinations for Major Sources in Accordance with Federal Clean Air Act, §112(j), 40 Code of Federal Regulations Part 63, Subpart B, §§63.50 - 63.56, are incorporated by reference as amended through July 11, 2005 (70 FR 39662) [~~May 30, 2003 (68 FR 32601)~~].

§113.106. List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List (40 Code of Federal Regulations Part 63, Subpart C).

The provisions of 40 Code of Federal Regulations Part 63, Subpart C, concerning the List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List, are incorporated by reference as amended through December 19, 2005 (70 FR 75057) [~~November 29, 2004 (69 FR 69325)~~].

§113.110. Synthetic Organic Chemical Manufacturing Industry (40 Code of Federal Regulations Part 63, Subpart F).

The Synthetic Organic Chemical Manufacturing Industry Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart F, is incorporated by reference as amended through December 21, 2006 (71 FR 76614) [~~June 23, 2003 (68 FR 37344)~~].

§113.120. Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater (40 Code of Federal Regulations Part 63, Subpart G).

The Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart G, is incorporated by reference as amended through December 21, 2006 (71 FR 76603) [~~June 23, 2003 (68 FR 37344)~~].

§113.170. Coke Oven Batteries (40 Code of Federal Regulations Part 63, Subpart L).

The Coke Oven Batteries Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart L, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37345)~~].

§113.180. Perchloroethylene Dry Cleaning Facilities (40 Code of Federal Regulations Part 63, Subpart M).

The Perchloroethylene Dry Cleaning Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart M, is incorporated by reference as amended through September 21, 2006 (71 FR 55280) [~~June 23, 2003 (68 FR 37347)~~].

§113.190. Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks (40 Code of Federal Regulations Part 63, Subpart N).

The Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart N, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~July 19, 2004 (69 FR 42894)~~].

§113.200. Ethylene Oxide Emissions Standards for Sterilization Facilities (40 Code of Federal Regulations Part 63, Subpart O).

The Ethylene Oxide Emissions Standards for Sterilization Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart O, is incorporated by reference as amended through December 19, 2005 (70 FR 75320) [~~June 23, 2003 (68 FR 37348)~~].

§113.220. Industrial Process Cooling Towers (40 Code of Federal Regulations Part 63, Subpart Q).

The Industrial Process Cooling Towers Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart Q, is incorporated by reference as amended through April 7, 2006 (71 FR 17738) [~~June 23, 2003 (68 FR 37348)~~].

§113.230. Gasoline Distribution Facilities (40 Code of Federal Regulations Part 63, Subpart R).

The Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations) Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart R, is incorporated by reference as amended through April 6, 2006 (71 FR 17352) [~~December 19, 2003 (68 FR 70965)~~].

§113.240. Pulp and Paper Industry (40 Code of Federal Regulations Part 63, Subpart S).

The Pulp and Paper Industry Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart S, is incorporated by reference as amended through April 13, 2004 (69 FR 19734) [~~June 23, 2003 (68 FR 37348)~~].

§113.250. Halogenated Solvent Cleaning (40 Code of Federal Regulations Part 63, Subpart T).

The Halogenated Solvent Cleaning Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart T, is incorporated by reference as amended through May 3, 2007 (72 FR 25138) [~~June 23, 2003 (68 FR 37349)~~].

§113.260. Group I Polymers and Resins (40 Code of Federal Regulations Part 63, Subpart U).

The Group I Polymers and Resins Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart U, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37349)~~].

§113.280. Epoxy Resins Production and Non-Nylon Polyamides Production (40 Code of Federal Regulations Part 63, Subpart W).

The Epoxy Resins Production and Non-Nylon Polyamides Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart W, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37350)~~].

§113.300. Marine Vessel Loading (40 Code of Federal Regulations Part 63, Subpart Y).

The Marine Vessel Loading Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart Y, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37350)~~].

§113.320. Phosphoric Acid Manufacturing Plants (40 Code of Federal Regulations Part 63, Subpart AA).

The Phosphoric Acid Manufacturing Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart AA, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37351)~~].

§113.330. Phosphate Fertilizers Production Plants (40 Code of Federal Regulations Part 63, Subpart BB).

The Phosphate Fertilizers Production Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart BB, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37351)~~].

§113.350. Off-Site Waste and Recovery Operations (40 Code of Federal Regulations Part 63, Subpart DD).

The Off-Site Waste and Recovery Operations Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart DD, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37351)~~].

§113.380. Aerospace Manufacturing and Rework Facilities (40 Code of Federal Regulations Part 63, Subpart GG).

The Aerospace Manufacturing and Rework Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart GG, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37352)~~].

§113.390. Oil and Natural Gas Production Facilities (40 Code of Federal Regulations Part 63, Subpart HH).

The Oil and Natural Gas Production Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart HH, is incorporated by reference as amended through January 3, 2007 (72 FR 26) [~~June 23, 2003 (68 FR 37353)~~].

§113.400. Shipbuilding and Ship Repair (Surface Coating) (40 Code of Federal Regulations Part 63, Subpart II).

The Shipbuilding and Ship Repair (Surface Coating) Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart II, is incorporated by reference as amended through December 29, 2006 (71 FR 78369) [~~June 23, 2003 (68 FR 37353)~~].

§113.420. Printing and Publishing (40 Code of Federal Regulations Part 63, Subpart KK).

The Printing and Publishing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart KK, is incorporated by reference as amended through May 24, 2006 (71 FR 29792) [~~June 23, 2003 (68 FR 37354)~~].

§113.430. Primary Aluminum Reduction Plants (40 Code of Federal Regulations Part 63, Subpart LL).

The Primary Aluminum Reduction Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart LL, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37354)~~].

§113.440. Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills (40 Code of Federal Regulations Part 63, Subpart MM).

The Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart MM, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~May 6, 2004 (69 FR 25323)~~].

§113.500. Closed Vent Systems, Control Devices, Recovery Devices, and Routing to a Fuel Gas System or a Process (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart SS).

The Closed Vent Systems, Control Devices, Recovery Devices, and Routing to a Fuel Gas System or a Process Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart SS, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~July 12, 2002 (67 FR 46258)~~].

§113.550. Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart XX).

The Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart XX, is incorporated by reference as amended through April 13, 2005 (70 FR 19266) [~~adopted July 12, 2002 (67 FR 46258)~~].

§113.560. Generic Maximum Achievable Control Technology Standards (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart YY).

The Generic Maximum Achievable Control Technology Standards as specified in 40 Code of Federal Regulations Part 63, Subpart YY, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~February 10, 2003 (68 FR 6635)~~].

§113.600. Steel Pickling - HCl Process Facilities and Hydrochloric Acid Regeneration Plants (40 Code of Federal Regulations Part 63, Subpart CCC).

The Steel Pickling - HCl Process Facilities and Hydrochloric Acid Regeneration Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart CCC, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37356)~~].

§113.620. Hazardous Waste Combustors (40 Code of Federal Regulations Part 63, Subpart EEE).

The Hazardous Waste Combustor Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart EEE, is incorporated by reference as amended through October 25, 2006 (71 FR 62388) [~~June 23, 2003 (68 FR 37356)~~].

§113.640. Pharmaceuticals Production (40 Code of Federal Regulations Part 63, Subpart GGG).

The Pharmaceuticals Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart GGG, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37356)~~].

§113.650. Natural Gas Transmission and Storage Facilities (40 Code of Federal Regulations Part 63, Subpart HHH).

The Natural Gas Transmission and Storage Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart HHH, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37357)~~].

§113.670. Group IV Polymers and Resins (40 Code of Federal Regulations Part 63, Subpart JJJ).

The Group IV Polymers and Resins Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart JJJ, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 2, 2004 (69 FR 31008)~~].

§113.690. Portland Cement Manufacturing Industry (40 Code of Federal Regulations Part 63, Subpart LLL).

The Portland Cement Manufacturing Industry Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart LLL, is incorporated by reference as amended through December 20, 2006 (71 FR 76518) [~~June 23, 2003 (68 FR 37359)~~].

§113.700. Pesticide Active Ingredient Production (40 Code of Federal Regulations Part 63, Subpart MMM).

The Pesticide Active Ingredient Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart MMM, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37358)~~].

§113.710. Wool Fiberglass Manufacturing (40 Code of Federal Regulations Part 63, Subpart NNN).

The Wool Fiberglass Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations

Part 63, Subpart NNN, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37358)~~].

§113.720. Manufacture of Amino/Phenolic Resins (40 Code of Federal Regulations Part 63, Subpart OOO).

The Manufacture of Amino/Phenolic Resins Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart OOO, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37359)~~].

§113.730. Polyether Polyols Production (40 Code of Federal Regulations Part 63, Subpart PPP).

The Polyether Polyols Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart PPP, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37359) with corrections published on July 1, 2004 (69 FR 39862)~~].

§113.740. Primary Copper Smelting (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart QQQ).

The Primary Copper Smelting Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart QQQ, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted June 12, 2002 (67 FR 40478)~~].

§113.750. Secondary Aluminum Production (40 Code of Federal Regulations Part 63, Subpart RRR).

The Secondary Aluminum Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart RRR, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37359)~~].

§113.770. Primary Lead Smelting (40 Code of Federal Regulations Part 63, Subpart TTT).

The Primary Lead Smelting Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart TTT, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37360)~~].

§113.780. Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart UUU).

The Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart UUU, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted April 11, 2002 (67 FR 17762)~~].

§113.810. Ferroalloys Production: Ferromanganese and Silicomanganese (40 Code of Federal Regulations Part 63, Subpart XXX).

The Ferroalloys Production: Ferromanganese and Silicomanganese Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart XXX, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~June 23, 2003 (68 FR 37360)~~].

§113.840. Municipal Solid Waste Landfills (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart AAAA).

The Municipal Solid Waste Landfills Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart AAAA, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted January 16, 2003 (68 FR 2227)~~].

§113.860. Manufacturing of Nutritional Yeast (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart CCCC).

The Manufacturing of Nutritional Yeast Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart CCCC, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted May 21, 2001 (66 FR 27876)~~].

§113.870. Plywood and Composite Wood Products (40 Code of Federal Regulations Part 63, Subpart DDDD).

The Plywood and Composite Wood Products Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart DDDD, is incorporated by reference as adopted July 30, 2004 (69 FR 45944) and amended February 16, 2006 (71 FR 8342) and April 20, 2006 (71 FR 20446).

§113.880. Organic Liquids Distribution (Non-Gasoline) (40 Code of Federal Regulations Part 63, Subpart EEEE).

The Organic Liquids Distribution (Non-Gasoline) Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart EEEE, is incorporated by reference as amended through July 28, 2006 (71 FR 42898) [~~adopted February 3, 2004 (69 FR 5063)~~].

§113.890. Miscellaneous Organic Chemical Manufacturing (40 Code of Federal Regulations Part 63, Subpart FFFF).

The Miscellaneous Organic Chemical Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart FFFF, is incorporated by reference as amended through July 14, 2006 (71 FR 40316) [~~adopted November 10, 2003 (68 FR 63888)~~].

§113.900. Solvent Extraction for Vegetable Oil Production (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart GGGG).

The Solvent Extraction for Vegetable Oil Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart GGGG, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~April 5, 2002 (67 FR 16317)~~].

§113.910. Wet-Formed Fiberglass Mat Production (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart HHHH).

The Wet-Formed Fiberglass Mat Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart HHHH, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted April 11, 2002 (67 FR 17824)~~].

§113.920. Surface Coating of Automobiles and Light-Duty Trucks (40 Code of Federal Regulations Part 63, Subpart IIII).

The Surface Coating of Automobiles and Light-Duty Trucks Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart IIII, is incorporated by reference as amended through April 24, 2007 (72 FR 20227) [~~adopted April 26, 2004 (69 FR 22623)~~].

§113.930. Paper and Other Web Coating (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart JJJJ).

The Paper and Other Web Coating Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart JJJJ, is incorporated by reference as amended through May 24, 2006 (71 FR 29792) [~~adopted December 4, 2002 (67 FR 72330)~~].

§113.940. Surface Coating of Metal Cans (40 Code of Federal Regulations Part 63, Subpart KKKK).

The Surface Coating of Metal Cans Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart KKKK, is incorporated by reference as amended

through April 20, 2006 (71 FR 20446) [adopted November 13, 2003 (68 FR 64446)].

§113.960. Surface Coating of Miscellaneous Metal Parts and Products (40 Code of Federal Regulations Part 63, Subpart MMMM).

The Surface Coating of Miscellaneous Metal Parts and Products Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart MMMM, is incorporated by reference as amended through December 22, 2006 (71 FR 76927) [April 26, 2004 (69 FR 22660)].

§113.970. Surface Coating of Large Appliances (40 Code of Federal Regulations Part [CFR] 63, Subpart NNNN).

The Surface Coating of Large Appliances Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart NNNN, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [adopted July 23, 2002 (67 FR 48254)].

§113.980. Printing, Coating, and Dyeing of Fabrics and Other Textiles (40 Code of Federal Regulations Part 63, Subpart OOOO).

The Printing, Coating, and Dyeing of Fabrics and Other Textiles Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart OOOO, is incorporated by reference as amended through May 24, 2006 (71 FR 29792) [adopted May 29, 2003 (68 FR 32189)].

§113.990. Surface Coating of Plastic Parts and Products (40 Code of Federal Regulations Part 63, Subpart PPPP).

The Surface Coating of Plastic Parts and Products Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart PPPP, is incorporated by reference as amended through April 24, 2007 (72 FR 20227) [April 26, 2004 (69 FR 22660)].

§113.1000. Surface Coating of Wood Building Products (40 Code of Federal Regulations Part 63, Subpart QQQQ).

The Surface Coating of Wood Building Products Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart QQQQ, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [adopted May 28, 2003 (68 FR 31760)].

§113.1010. Surface Coating of Metal Furniture (40 Code of Federal Regulations Part 63, Subpart RRRR).

The Surface Coating of Metal Furniture Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart RRRR, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [adopted May 23, 2003 (68 FR 28619)].

§113.1030. Leather Finishing Operations (40 Code of Federal Regulations Part [CFR] 63, Subpart TTTT).

The Leather Finishing Operations Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart TTTT, is incorporated by reference as amended through February 7, 2005 (70 FR 6355) [adopted February 27, 2002 (67 FR 9156)].

§113.1040. Cellulose Products Manufacturing (40 Code of Federal Regulations Part [CFR] 63, Subpart UUUU).

The Cellulose Products Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart UUUU, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [adopted June 11, 2002 (67 FR 40044)].

§113.1060. Reinforced Plastic Composites Production (40 Code of Federal Regulations Part 63, Subpart WWWW).

The Reinforced Plastic Composites Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart WWWW, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [adopted April 21, 2003 (68 FR 19402)].

§113.1070. Rubber Tire Manufacturing (40 Code of Federal Regulations Part [CFR] 63, Subpart XXXX).

The Rubber Tire Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart XXXX, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [March 12, 2003 (68 FR 11745)].

§113.1080. Stationary Combustion Turbines (40 Code of Federal Regulations Part 63, Subpart YYYY).

The Stationary Combustion Turbines Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart YYYY, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [August 18, 2004 (69 FR 51188)].

§113.1090. Stationary Reciprocating Internal Combustion Engines (40 Code of Federal Regulations Part 63, Subpart ZZZZ).

The Stationary Reciprocating Internal Combustion Engines Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart ZZZZ, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [adopted June 15, 2004 (69 FR 33506)].

§113.1100. Lime Manufacturing Plants (40 Code of Federal Regulations Part 63, Subpart AAAAA).

The Lime Manufacturing Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart AAAAA, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [adopted January 5, 2004 (69 FR 416)].

§113.1110. Semiconductor Manufacturing (40 Code of Federal Regulations Part 63, Subpart BBBBB).

The Semiconductor Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart BBBBB, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [adopted May 22, 2003 (68 FR 27925)].

§113.1120. Coke Ovens: Pushing, Quenching, and Battery Stacks (40 Code of Federal Regulations Part 63, Subpart CCCCC).

The Coke Ovens: Pushing, Quenching, and Battery Stacks Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart CCCCC, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [April 22, 2003 (68 FR 19885)].

§113.1130. Industrial, Commercial, and Institutional Boilers and Process Heaters (40 Code of Federal Regulations Part 63, Subpart DDDDD).

The Industrial, Commercial, and Institutional Boilers and Process Heaters Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart DDDDD, is incorporated by reference as adopted September 13, 2004 (69 FR 55218) and amended December 28, 2005 (70 FR 76918), April 20, 2006 (71 FR 20446), and December 6, 2006 (71 FR 70651).

§113.1140. Iron and Steel Foundries (40 Code of Federal Regulations Part 63, Subpart EEEEE).

The Iron and Steel Foundries Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart EEEEE, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [adopted April 22, 2004 (69 FR 21923)].

§113.1150. Integrated Iron and Steel Manufacturing Facilities (40 Code of Federal Regulations Part 63, Subpart FFFFF).

The Integrated Iron and Steel Manufacturing Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart FFFFF, is incorporated by reference as amended through July 13, 2006 (71 FR 39579) [~~adopted May 20, 2003 (68 FR 27663)~~].

§113.1160. Site Remediation (40 Code of Federal Regulations Part 63, Subpart GGGGG).

The Site Remediation Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart GGGGG, is incorporated by reference as amended through November 29, 2006 (71 FR 69011) [~~adopted October 8, 2003 (68 FR 58190)~~].

§113.1170. Miscellaneous Coating Manufacturing (40 Code of Federal Regulations Part 63, Subpart HHHHH).

The Miscellaneous Coating Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart HHHHH, is incorporated by reference as amended through October 4, 2006 (71 FR 58499) [~~adopted December 11, 2003 (68 FR 69185) with corrections published on December 29, 2003 (68 FR 75033)~~].

§113.1180. Mercury Emissions from Mercury Cell Chlor-Alkali Plants (40 Code of Federal Regulations Part 63, Subpart IIIII).

The Mercury Emissions from Mercury Cell Chlor-Alkali Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart IIIII, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted December 19, 2003 (68 FR 70928)~~].

§113.1190. Brick and Structural Clay Products Manufacturing (40 Code of Federal Regulations Part 63, Subpart JJJJJ).

The Brick and Structural Clay Products Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart JJJJJ, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted May 16, 2003 (68 FR 26722) with corrections published on May 28, 2003 (68 FR 31744)~~].

§113.1200. Clay Ceramics Manufacturing (40 Code of Federal Regulations Part 63, Subpart KKKKK).

The Clay Ceramics Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart KKKKK, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted May 16, 2003 (68 FR 26738) with corrections published on May 28, 2003 (68 FR 31744)~~].

§113.1210. Asphalt Processing and Asphalt Roofing Manufacturing (40 Code of Federal Regulations Part 63, Subpart LLLLL).

The Asphalt Processing and Asphalt Roofing Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart LLLLL, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~May 7, 2003 (68 FR 24577)~~].

§113.1220. Flexible Polyurethane Foam Fabrication Operations (40 Code of Federal Regulations Part 63, Subpart MMMMM).

The Flexible Polyurethane Foam Fabrication Operations Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart MMMMM, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted April 14, 2003 (68 FR 18070)~~].

§113.1230. Hydrochloric Acid Production (40 Code of Federal Regulations Part 63, Subpart NNNNN).

The Hydrochloric Acid Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart NNNNN, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted April 17, 2003 (68 FR 19090)~~].

§113.1250. Engine Test Cells/Stands (40 Code of Federal Regulations Part 63, Subpart PPPPP).

The Engine Test Cells/Stands Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart PPPPP, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted May 27, 2003 (68 FR 28785) with corrections published on August 28, 2003 (68 FR 51830)~~].

§113.1260. Friction Materials Manufacturing Facilities (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart QQQQQ).

The Friction Materials Manufacturing Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart QQQQQ, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted October 18, 2002 (67 FR 64498)~~].

§113.1270. Taconite Iron Ore Processing (40 Code of Federal Regulations Part 63, Subpart RRRRR).

The Taconite Iron Ore Processing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart RRRRR, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted October 30, 2003 (68 FR 61888)~~].

§113.1280. Refractory Products Manufacturing (40 Code of Federal Regulations Part 63, Subpart SSSSS).

The Refractory Products Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart SSSSS, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted April 16, 2003 (68 FR 18747)~~].

§113.1290. Primary Magnesium Refining (40 ~~[CFR]~~ Code of Federal Regulations Part 63, Subpart TTTTT).

The Primary Magnesium Refining Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart TTTTT, is incorporated by reference as amended through April 20, 2006 (71 FR 20446) [~~adopted October 10, 2003 (68 FR 58620)~~].

§113.1390. Polyvinyl Chloride and Copolymers Production Area Sources (40 Code of Federal Regulations Part 63, Subpart DDDDDD).

The Polyvinyl Chloride and Copolymers Production Area Sources Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart DDDDDD, is incorporated by reference as adopted January 23, 2007 (72 FR 2930).

§113.1400. Primary Copper Smelting Area Sources (40 Code of Federal Regulations Part 63, Subpart EEEEEE).

The Primary Copper Smelting Area Sources Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart EEEEEE, is incorporated by reference as adopted January 23, 2007 (72 FR 2930).

§133.1410. Secondary Copper Smelting Area Sources (40 Code of Federal Regulations Part 63, Subpart FFFFFF).

The Secondary Copper Smelting Area Sources Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart FFFFFF, is incorporated by reference as adopted January 23, 2007 (72 FR 2930).

§113.1420. Primary Nonferrous Metals Area Sources - Zinc, Cadmium, and Beryllium (40 Code of Federal Regulations Part 63, Subpart GGGGGG).

The Primary Nonferrous Metals Area Sources - Zinc, Cadmium, and Beryllium Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart GGGGGG, is incorporated by reference as adopted January 23, 2007 (72 FR 2930).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§114.7, 114.62, 114.64, 114.66, and 114.70.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The commission proposes these revisions in order to implement requirements of Senate Bill (SB) 12, authored by the Honorable Senator Averitt, passed during the 80th Legislature, 2007. During the 77th Legislature, 2001, the legislature adopted provisions, House Bill (HB) 2134, to assist low income individuals with repairs, retrofits, or retirement of vehicles that fail emissions inspections. As required by HB 2134, the commission adopted rules providing the minimum guidelines for counties to implement a low income vehicle repair assistance, retrofit, and accelerated vehicle retirement program (LIRAP).

On March 27, 2002, the commission adopted requirements implementing HB 2134, 77th Legislature, 2001. Only those counties that have implemented a vehicle inspection and maintenance (I/M) program are eligible for participation in the LIRAP. Under the program, monetary assistance is provided for emission-related repairs directly related to bringing the vehicle into compliance or for replacement assistance for a vehicle that has failed the required emissions test. Vehicle eligibility criteria, such as the vehicle having been registered for the past two years in the participating county, were developed and adopted by the commission. Emission-related repairs covered by the program are required to be performed at a Texas Department of Public Safety (DPS) recognized emissions repair facility. Participating counties may administer the program themselves or contract with a private entity or another county to administer the program. The 2001 law stated that participating counties could expend no more than five percent of the funds received from the state for administrative costs. These rules provided for a minimum of $30 and a maximum amount of $600 for emission-related repairs, retrofit equipment, and installation and a minimum of $600 and a maximum amount of $1,000 toward the purchase price of a replacement vehicle.

During the 79th Legislature, 2005, the legislature adopted HB 1611, revising three key elements of the program. The legislation allowed for the LIRAP to be administered by the counties in accordance with Texas Government Code, Chapter 783 (relating to Uniform Grant and Contract Management), and allowed for programmatic costs such as call-center management, application oversight, invoice analysis, education, outreach, and advertising to be covered by LIRAP funds. The revision allowed for program administrators to utilize additional resources to attract and increase program participation. The legislation removed the requirement that capped five percent of the funds provided to a county to fund the LIRAP be used to cover administrative costs. Finally, the legislation changed the vehicle registration eligibility requirement from two years to 12 months. The revision increased participation by making assistance available to those vehicle owners who have lived in the county for at least one year. The commission adopted rule revisions implementing HB 1611 on April 12, 2006.

During the 80th Legislature, 2007, the legislature adopted SB 12, revising elements of the I/M program and LIRAP requirements. Revisions include enhanced capabilities for the retirement of old vehicles and their replacement with new vehicles. Old vehicle requirements include: gasoline-powered and older than 10 years; owner financial eligibility requirements (up to 300 percent of federal poverty level); operated and registered in the implementing county for 12 months preceding the application; and has passed the DPS safety or safety and emissions inspection within 15 months of application. The legislation also provided for replacement assistance for owners of vehicles passing the required I/M program acceleration simulation mode (ASM) emissions test but that would have failed the more stringent United States Environmental Protection Agency (EPA) Final ASM standards (also known as "final cut-points") emissions test. The revised maximum amounts for a new replacement vehicle are $3,000 for a car, current model year and up to three model years old; $3,000 for a truck, current model year and up to two model years old; $3,500 for a hybrid vehicle of current or previous model year. The new vehicle must meet federal Tier 2, Bin 5 or cleaner emissions standards; have a gross vehicle weight rating of less than 10,000 pounds; and have a total purchase cost that does not exceed $25,000.

SB 12 requires that dealers participating in the program and taking possession of the old vehicle submit proof that the vehicle has been retired. The vehicle retirement facility is required to destroy the emissions control equipment and engine and certify that those parts have been destroyed and not resold in the marketplace. Mercury switches must also be removed in accordance with any state and federal laws. The commission has included language to highlight concerns regarding fraud to ensure the vehicle retirement facilities have a clear understanding of the potential enforcement consequences. The legislation provided language that requires dealers and dismantlers participating in the program to be located in the state.

Additional revisions include limiting funding for administration and program costs of the local LIRAP to 10 percent of the money provided for the local program and requiring participating LIRAP counties to provide an electronic means for distributing funds for

vehicle repairs or replacements. The county shall ensure that funds are transferred to a participating dealer not later than five business days after the sale of a replacement vehicle is completed. The legislation also requires that the commission establish procedures for a document confirming that the person is eligible to purchase a replacement vehicle, that the person applying for vehicle replacement have the document to participate in replacement, and that a dealer that relies on the document has no duty to confirm eligibility. New legislation amended current LIRAP definitions to include "Destroy," "Motor vehicle," "Hybrid motor vehicle," "Qualifying motor vehicle," "Emissions control equipment," "Dealer," "Automobile dealership," "Total cost," "Engine," and "Replacement vehicle." New definitions for "Truck" and "Car" are also proposed to determine the vehicle model types that are associated with "truck" and "car" categories.

The legislation also authorizes the appropriation of $5 million per fiscal year from LIRAP funds, on a matching basis, to administer LIRAP Local Initiative Projects. The projects must be implemented in consultation with the commission and may include expanding and enhancing AirCheckTexas; developing and implementing programs to remotely determine vehicle emissions and notify the vehicle's operator; developing and implementing projects to implement the commission's smoking vehicle program; developing and implementing projects for coordinating with local law enforcement officials to reduce the use of counterfeit state inspection stickers; developing and implementing programs to enhance transportation system improvements; or developing and implementing new air control strategies designed to assist local areas in complying with state and federal air quality rules and regulations.

Grammatical, style, and other non-substantive corrections are made throughout the rulemaking to be consistent with *Texas Register* requirements, to improve readability, and to conform to the drafting standards in the *Texas Legislative Drafting Manual*, August 2006. Such changes include appropriate and consistent use of acronyms, section references, and certain terminology such as "shall" and "must." These changes are not discussed further.

SECTION BY SECTION DISCUSSION

Subchapter A, Definitions

§114.7 Low Income Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program Definitions

The proposed amendments to §114.7, Low Income Vehicle Repair, Assistance, Retrofit, and Accelerated Vehicle Retirement Program Definitions, include adding and defining the following terms: automobile dealership, car, emissions control equipment, engine, hybrid motor vehicle, motor vehicle, qualifying motor vehicle, total cost, and truck. The commission proposes definitions for hybrid motor vehicle, motor vehicle, qualifying motor vehicle, and total cost as the terms are defined by SB 12. The legislation requires the commission to adopt rules defining emission control equipment and engine. The commission has elected to define automobile dealership, car, and truck. The proposed rule defines "Automobile dealership" following similar provisions in the Texas Transportation Code, §503.301. The definitions of "Car" and "Truck" have been added to clarify the new compensation amounts for a replacement vehicle, which are: $3,000 for a car, current model year or up to three model years old and $3,000 for a truck, current model year or up to two model years old. The definition of "Destroy" has been amended to include the word "scrapped" and to clarify the disposition of engine and emission control components. The commission has amended the definition of "Replacement vehicle" to meet the new vehicle qualifying requirements found in SB 12. The proposal will also renumber the LIRAP definitions section to make adjustments for the proposed new definitions.

Subchapter C, Vehicle Inspection & Maintenance; Low Income Vehicle Repair Assistance, Retrofit & Accelerated Vehicle Retirement Program; and Early Action Compact Counties

Division 2, Low Income Vehicle Repair Assistance Retrofit & Accelerated Vehicle Retirement Program

§114.62, Subchapter C, LIRAP Funding

The proposed amendment to §114.62 will add subsection (d) to include the LIRAP funding limit for administration and program costs of the LIRAP program to not more than 10 percent of the money provided as stated in SB 12.

§114.64, LIRAP Requirements

The proposed amendment to §114.64(b)(5) changes a vehicle owner's net family income eligibility from 200 percent to 300 percent of the federal poverty level. This change will increase the income eligibility amount for LIRAP participants.

The proposed amendments to §114.64(c) would restructure all existing eligibility application requirements currently under paragraphs (1), (2), and (3) into one new paragraph (1). Old paragraphs (1), (2), and (3) have been renumbered subparagraphs (A), (B), and (C). New paragraphs (2), (3), and (4) have been added to §114.64(c). The proposed new §114.64(c)(2), would include pre-1996 model year vehicles undergoing an ASM emissions test as part of the I/M program to become eligible for LIRAP assistance if the vehicle passes the state's current test standards, but would have failed the more stringent standards known as EPA Final Cut-Points. The commission requests public comment specific to whether Final Cut-Points should be adopted for the ASM emissions test performed on gasoline-powered, model year 1995 and older vehicles. The new §114.64(c)(3) will enhance capabilities for the retirement of vehicles. It will allow a gasoline-powered motor vehicle to be eligible for replacement if the vehicle is at least 10 years old and the owner meets the financial eligibility requirements (up to 300 percent of the federal poverty level). The new §114.64(c)(4)(A) - (D) sets criteria for replacement vehicles. A new replacement vehicle must meet federal Tier 2, or Bin 5 or cleaner emission standards; have a gross vehicle weight rating of less than 10,000 pounds; have a total purchase cost that does not exceed $25,000; and have passed a DPS motor vehicle safety inspection or safety and emissions inspection within a 15-month period before the application is submitted.

The proposed amendment to §114.64(d)(1)(B) would delete the previous requirements related to vehicle compensation and replace them with the new requirements set forth by SB 12. The revision will include adding clauses (i), (ii), and (iii). The new compensation amounts for a replacement vehicle are: $3,000 for a car, current model year or up to three model years old; $3,000 for a truck, current model year or up to two model years old; and $3,500 for a hybrid vehicle of current or previous model year. The proposed revision to §114.64(d)(3) deletes the phrase *maximum and minimum* and replaces it with *compensation*. The revision is necessary to bring rule language into agreement with the new proposed revised compensation requirements in §114.64(d)(1)(B)(i), (ii), and (iii).

The proposed amendment to §114.64(e) includes changing the header from *Reimbursement* to *Reimbursement for repairs and retrofit* in order to correctly reflect the modified content in the subsection. The amendment also includes language that requires the county to provide an electronic means for distributing vehicle repair and retrofit funds and that the funds be made available to reimburse the appropriate emission repair facility within five business days. This revision is proposed to establish consistency with the five-day reimbursement requirement for automobile dealerships set forth in SB 12. The proposal will also renumber the paragraphs in the subsection to make adjustments for the proposed new language.

The proposed new §114.64(f), Reimbursements for replacements, requires that a participating county distribute vehicle replacement funds to a participating automobile dealership no later than five business days after the date the county receives proof of the sale and required administrative documents, including certification from the dismantler that the retired vehicle has been destroyed. The new §114.64(f)(1) requires a participating county provide an electronic means for distributing vehicle replacement funds within five business days as stated in §114.64(f). Automobile dealerships participating in the program must be located in the state, and participation in LIRAP by an automobile dealership is voluntary. The language also allows automobile dealerships participating in the program to accept funds provided under LIRAP as a down payment towards the purchase of a replacement vehicle.

The proposed new §114.64(f)(2) requires participating counties to develop a document to be used to confirm that a person is eligible to purchase a replacement vehicle. The proposed new §114.64(f)(2)(A) requires that the document must include, at a minimum, the full name of the applicant, the vehicle identification number of the retired vehicle, expiration date of the document, the program administrator's contact information, and the amount of money available to the purchaser. The proposed new §114.64(f)(2)(B) requires the purchaser to have the document before the person enters into negotiations with a dealer for a replacement vehicle, and the proposed new §114.64(f)(2)(C) provides that a participating dealer who relies on the document has no duty to confirm eligibility of the person purchasing a replacement vehicle.

§114.66, Disposition of Retired Vehicle

The proposed amendment to §114.66 would revise subsections (a) and (b) and add new subsections (c), (d), and (e). The proposed §114.66(a) includes language requiring dismantlers participating in the program be located in the state. The proposed §114.66(b) provides vehicle disposition requirements. The proposed §114.66(c) includes language that requires dismantlers taking possession of the old vehicle to destroy the emissions control equipment and engine and certify that those parts have been destroyed and not resold into the marketplace. The revision will also include language requiring the dismantlers to remove any mercury switches in accordance with any state and federal law. The proposed new §114.66(d) requires the dismantler to provide certification that the retired vehicle has been destroyed. The proposed new §114.66(e) requires the dismantler to provide the residual scrap metal of a retired vehicle to a recycling facility at no cost, except the cost of transportation of the residual scrap metal to the recycling facility.

§114.70, Records, Audits, and Enforcement

The proposed new §114.70(f) requires participating vehicle retirement facilities to certify that the equipment and engine have been destroyed and not resold into the marketplace. A violation of this requirement is subject to civil penalty under Subchapter D, Chapter 7, Water Code, for each violation.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency and for counties in nonattainment areas or Early Action Compact (EAC) counties that participate in the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) as a result of administration or enforcement of the proposed rules. The proposed rules implement portions of SB 12, 80th Legislature, Regular Session, and are intended to broaden program eligibility requirements and provide additional funding for LIRAP participants and counties that administer the program as well as provide additional funding for those counties who choose to implement the local air quality initiatives.

The LIRAP provides funds to participating counties to administer the program and provides financial assistance to low-income individuals with repairs, retrofits, or retirement of vehicles that fail an emissions test. The Federal Clean Air Act requires vehicle emissions testing in certain nonattainment areas. Other counties have committed to implement the testing programs as part of EACs.

The proposed amendments are intended to increase participation in LIRAP. Financial eligibility requirements for vehicle repair and replacement would be broadened to include owners whose net family income is at or less than 300 percent of the federal poverty level. The proposed amendments would also provide increased maximum amounts for a replacement vehicle and would amend current LIRAP definitions to include hybrid motor vehicle, motor vehicle, qualifying motor vehicle, truck, car, automobile dealership, total cost, emissions control equipment, and engine.

The proposed amendments will result in increased TCEQ responsibilities in implementing LIRAP. The agency will be required to revise certain I/M program procedures and LIRAP requirements and guidelines. The agency will have to administer 32 separate contracts with counties participating in LIRAP--16 contracts for the current vehicle repair and assistance program and 16 contracts for LIRAP Local Initiatives Projects.

The agency will be required to review and monitor county administrative costs, grant contracts, matching funds, and assistance to ensure compliance with program requirements as well as monitor progress of the projects. Additionally, the TCEQ will be required to participate as a consultant in developing the proposed local initiative projects.

The proposed rulemaking requires that the TCEQ make available LIRAP replacement assistance for vehicles model year 1995 and older that pass an emissions test at the current test cut-points, but would have failed if the test were performed at federal final cut-points. The TCEQ is also required to determine by January 1, 2008, if these final cut-points should be adopted as a test standard. Contracts for installing final cut point software in emissions analyzers (Environmental Systems Product (ESP), Snap On Diagnostics, and Worldwide Environmental Products (WorldWide)) to implement the new final cut-point initiative will need to be processed.

The agency was appropriated $45 million in LIRAP and $5 million for LIRAP Local Initiative Projects funding each year for Fiscal Year 2008 and for Fiscal Year 2009 (an increase from $4.4 million in Fiscal Year 2006 and for Fiscal Year 2007). It is assumed this level of funding will remain constant for the remainder of the five-year period, but any future LIRAP funding depends upon legislative appropriations. Of the amounts appropriated each fiscal year, $210,000 was appropriated per fiscal year for administering the LIRAP and LIRAP Local Initiative Projects programs. In addition, the agency was appropriated $2,062,582 in FY08 and $2,082,459 in FY09 for administering the vehicle I/M emissions testing program. In order to implement the new program requirements, the agency is expected to use a portion of the vehicle I/M emission testing program appropriation in addition to the LIRAP administration appropriation (both from Clean Air Account 151). For the first year the program is in place, agency costs are anticipated to be: $250,000 to publicize the program with automobile manufacturers and dealers; $100,000 to reprint LIRAP brochures/applications; $300,000 for final cut-point software for emissions analyzers (three Vendors at $100,000 per vendor); and $192,239 for monitoring and program implementation/administration.

For the remainder of the five-year period covered by the fiscal note, the agency is anticipated to expend $250,000 yearly to cover the TCEQ portion of LIRAP publicity with automobile manufacturers and dealers; $10,000 yearly for the printing of additional LIRAP brochures/applications; and $192,239 yearly for monitoring and administration of LIRAP and local initiative projects. The agency may need to contract out for some of the monitoring and/or administration functions as no new FTEs were provided by the legislature. The proposed rulemaking would also require the TCEQ to include requirements for a procedure for the development of a document confirming that the person seeking to retire and replace a vehicle is eligible for vehicle replacement and the amount of money available to the purchaser and that the purchaser has the document before entering into negotiations with the dealer for a replacement vehicle.

Sixteen counties that have implemented the I/M program are participating in the LIRAP. In the Houston-Galveston-Brazoria area: Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties will be affected. In the Dallas-Fort Worth area: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties will be affected. In the Austin area: Travis and Williamson Counties will be affected. The proposed rules cap allowable county administrative costs for LIRAP at 10 percent of the money provided. Any costs for county governments or their contracted program administrators participating in LIRAP over the next five years are anticipated to be funded with the allowable administrative funding. Some of the costs for these entities will be the result of SB 12 and the proposed rulemaking, which requires participating LIRAP counties or contracted entities to provide an electronic means for distributing funds for vehicle repairs or replacements. Additionally, the county or contracted entity must ensure that funds are transferred to a participating repair facility or participating dealer within five business days after the sale of a replacement vehicle is completed.

Counties that participate in LIRAP are eligible to participate in LIRAP Local Initiative Projects. LIRAP Local Initiative Projects was appropriated $5 million per fiscal year. Counties that choose to participate in LIRAP Local Initiative Projects will be required to match their LIRAP Local Initiative Projects funding dollar for dollar. Although in-kind matching is allowed, counties cannot use any activity funded by LIRAP funds to satisfy the LIRAP Local Initiative Projects matching requirement. Local Initiative Projects are to be developed in consultation with the TCEQ and may include: expanding and enhancing AirCheckTexas; developing and implementing programs to remotely determine vehicle emissions and notify the vehicle's operator; developing and implementing projects to implement the commission's smoking vehicle program; developing and implementing projects for coordinating with local law enforcement officials to reduce the use of counterfeit state inspection stickers; developing and implementing programs to enhance transportation system improvements; and/or developing and implementing new air control strategies designed to assist local areas in complying with state and federal air quality rules and regulations.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that, for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will ensure that the intended effectiveness of the program is met. It is anticipated that 25,572 vehicles will be retired or repaired each fiscal year through the LIRAP. Additionally, local projects initiated and implemented through LIRAP Local Initiative Projects will have a positive impact on air quality and provide constituents with opportunities to participate in a community's efforts to address local air pollution contributions.

Fiscal implications are anticipated for businesses and individuals located in counties that participate in the LIRAP. The proposed rulemaking does not impose new costs to any industry, business, or individual. The proposed rulemaking expands LIRAP assistance eligibility requirements, making more vehicle owners eligible for repairs and retirement/replacements and establishes increased levels of assistance for retirement and replacement compensation. These two activities will provide financial opportunities for certain vehicle repair facilities and automobile dealerships. It is estimated that approximately $41 million per fiscal year will be available for vehicle repair and retirement/replacement assistance over what has been available in previous years (approximately $4 million per fiscal year).

Automobile dealerships and dismantlers in participating LIRAP counties will be affected by this rulemaking in that they are expected to realize an increase in their business activities. However, some small used car dealers that concentrate on sales of older vehicles may not be able to participate in the LIRAP retirement and replacement program. In addition, because the proposed rulemaking will require the automobile dealership to work with dismantlers to ensure that a vehicle is retired and its emissions components and engine are destroyed, some car dealers may incur costs associated with the transportation of retired vehicles, especially if they process a low number of vehicle retirements.

Automobile dealerships wanting to participate in the LIRAP retirement and replacement program will be required by the proposed rulemaking to sell replacement vehicles that meet qualifying vehicle requirements. Replacement vehicles must be new or no more than three model years old, meet a federal Tier 2, Bin 5 or cleaner emission standard, weigh less than 10,000 pounds, and cost less than $25,000. Automobile dealerships must also be willing to accept the approved eligibility certificate to be developed by the county program administrator with guidance from the TCEQ, as proof of eligibility and as a warrant for a designated monetary value.

The proposed rule will require that dealers take possession of the old vehicle and submit proof to the program administrator that the vehicle was retired. The dismantler is required to destroy the engine and the emissions equipment and certify that those parts have been destroyed and not resold in the marketplace and remove any mercury switches in accordance with any applicable state and federal law. The proposed rule language will require dealers and dismantlers participating in the program to be located in the state, but no dealer is required to participate in the program. The rulemaking also provides language that the dealer is not held responsible for the disposition of the vehicle if they have proof of a transfer to a dismantler.

Vehicle owners whose income for their family unit is at or less than 300 percent of the federal poverty rate will be eligible to participate in LIRAP as long as the replacement vehicle is a qualified motor vehicle. The increase in income eligibility to 300 percent of the federal poverty level has the potential to impact over 1.9 million households in the program areas. A vehicle is eligible for retirement if the vehicle is at least ten years old; the vehicle owner meets the financial eligibility requirements (up to 300 percent of federal poverty level); the vehicle is operated and registered in the implementing county for 12 months preceding the application; and has passed a DPS motor vehicle safety inspection or safety and emissions inspection with 15 months of application. The proposed rules would also provide assistance for replacement of a pre-1996 vehicle that passes the required EPA Start-Up ASM standards emissions test but that would have failed the EPA Final ASM standards emissions test or some other criterion determined by the commission.

These vehicle owners may be eligible for assistance of up to: $3,000 for a replacement car of the current model year or the previous 3 model years; $3,000 for a replacement truck of the current model year or the previous 2 model years; or $3,500 for a hybrid vehicle of current or previous model year. The replacement vehicle must meet a federal Tier 2, Bin 5 or cleaner emission standard, weigh less than 10,000 pounds (gross vehicle weight), and cost less than $25,000.

Vehicle owners who meet eligibility requirements, including having net income at or less than 300 percent of the federal poverty rate, will be eligible for repair assistance of up to $600 if their vehicle fails an emissions test. Vehicle owners whose vehicles fail an emissions test, whose vehicles are at least 10 years old and have passed an emissions test or whose vehicles are model year 1995 and older and passed the current emissions test, but would have failed the test if federal final cut-points were in place, may also be eligible for retirement/replacement assistance.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are expected for small or micro-businesses as a result of the proposed rules. Participation in the program is voluntary. A small business is defined as having fewer than 100 employees or less than $1 million in annual gross receipts. A micro-business is defined as having no more than 21 employees.

It is estimated that there are 325 Recognized Emission Repair Facilities in the state, and it is not known how many automobile dealerships are small or micro-businesses; but the number is believed to be limited. Vehicle repair facilities and used automobile dealerships may see an increase in business activity if they choose to participate in LIRAP. Vehicle repair facilities must be Texas Department of Public Safety Recognized Repair Facilities--this is not a new requirement, but an LIRAP requirement for facilities wanting to participate in the program. Used automobile dealerships wanting to participate in the program will have to have vehicles meeting the program requirements available. Some small used automobile dealerships that concentrate on older vehicles may not be able to participate in LIRAP. Because the proposed rulemaking will require the auto dealer to work with dismantlers to ensure that a vehicle is retired and its emissions components and engine are destroyed, some dealers may incur costs associated with the transportation of retired vehicles, especially if they process a low number of vehicle retirements.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking implements SB 12 by providing revisions for elements of LIRAP. The proposed rulemaking addresses issues related to vehicle air emissions and increasing LIRAP participation. The proposed rulemaking implements changes to eligibility criteria to increase participation and implements legislation aimed at providing incentives for vehicle owners to retire older vehicles and replace with newer, cleaner running vehicles. The rules are intended to protect the environment or reduce risks to human health from environmental exposure to ozone by assisting low income motorists in repairing, retrofitting, or retiring vehicles that have failed an emissions test under the state's vehicle emissions I/M program. As such, these rules do not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or sector of the state. Therefore, the proposed rulemaking does not meet the definition of a "major environmental rule."

In addition, a regulatory impact analysis is not required because the proposed rules do not meet any of the four applicability criteria for requiring a regulatory analysis of a "major environmental rule" as defined in the Texas Government Code. Section 2001.0225 applies only to a major environmental rule the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law, and the adopted technical requirements are consistent with applicable federal standards. In addition, this rulemaking does not exceed an express requirement of state law and is not adopted

solely under the general powers of the agency, but is specifically authorized by the provisions cited in the STATUTORY AUTHORITY section of this preamble. Finally, this proposed rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rulemaking action and performed an analysis of whether the proposed rules are subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with SB 12. These proposed amendments revise requirements for a voluntary program and only affect motor vehicles that are not considered to be private real property. Therefore, promulgation and enforcement of these proposed rules are neither a statutory nor a constitutional taking because they do not affect private real property. Therefore, these proposed rule amendments do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq*., and, therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the proposed rule is to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. The CMP policy applicable to the proposed rule is the policy (31 TAC §501.14(q)) that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal area (31 TAC §501.14(q)).

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas and because the proposed rulemaking does not authorize any new air contaminants and is intended to provide enhanced I/M program and LIRAP strategies. Therefore, this proposed rulemaking is consistent with the applicable policy and goal.

Written comments on the consistency of this proposed rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

Public hearings on this proposal will be held in Austin on September 11, 2007, at 9:30 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building F, Room 2210; in Houston on September 11, 2007, at 1:30 p.m. at the Houston-Galveston Area Council located at 3555 Timmons Lane, Suite 120, Room A; and in Arlington on September 11, 2007, at 1:30 p.m. at the North Central Texas Council of Governments at 616 Six Flags Drive, Centerpoint II, in the Metroplex Conference Room. The hearings will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, agency staff will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lesley Williamson, Office of Legal Services, at (512) 239-2461. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lesley Williamson, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-026-114-EN. The comment period closes September 12, 2007. Copies of the proposed rule can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Bob Wierzowiecki, Air Quality Division, (512) 239-1769.

SUBCHAPTER A. DEFINITIONS

30 TAC §114.7

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and §5.013, which states the commission's authority over various statutory programs. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.013, which authorizes the commission to designate air quality control regions in order to implement air quality standards; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §§382.201 - 382.218 and 382.301 - 382.302, which provide the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of the Federal Clean Air Act (42 United States Code, §§7401 *et seq*.), to coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of the National Ambient Air Quality Standards, and to fund the Low Income Vehicle Repair Assistance, Retrofit,

and Accelerated Vehicle Retirement Program (LIRAP). Finally, the amendment is proposed as part of the implementation of SB 12, 80th Legislature, 2007.

The proposed amendment implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.019, 382.201 - 382.218 and 382.301 - 382.302; and provisions of SB 12, 80th Legislature, 2007.

§114.7. Low Income Vehicle Repair Assistance, Retrofits, and Accelerated Vehicle Retirement Program Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) [~~TCAA~~] or in the rules of the commission, the terms used in this chapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, §§3.2, 101.1, and 114.1 of this title (relating to Definitions), the following words and terms, when used in Subchapter C, Division 2, of this chapter (relating to LIRAP) shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Automobile dealership--A business that regularly and actively buys, sells, or exchanges vehicles at an established and permanent location as defined under Transportation Code, §503.301. The term includes a franchised motor vehicle dealer and an independent motor vehicle dealer.

(3) Car--A motor vehicle, other than a golf cart, truck or bus, designed or used primarily for the transportation of persons. A passenger van or sports utility vehicle may be considered a car under this section.

(4) [~~(2)~~] Commercial vehicle--A vehicle that is owned or leased in the regular course of business of a commercial or business entity.

(5) [~~(3)~~] Destroyed--Crushed, shredded, scrapped, or otherwise dismantled to render a vehicle, vehicle's engine, or emission control components permanently and irreversibly incapable of functioning as originally intended.

(6) [~~(4)~~] Dismantled--Extraction of parts, components, and accessories for use in the low income vehicle repair assistance, retrofit, and accelerated vehicle retirement program or sold as used parts.

(7) Emissions control equipment--Relating to a motor vehicle that is subject to §114.50(a) of this title (relating to Vehicle Emissions Inspection Requirements). If the vehicle is so equipped, these include: exhaust gas recirculation system, power control module, catalytic converter, oxygen sensors, evaporative purge canister, positive crankcase ventilation valve, and gas cap.

(8) Engine--The fuel-based power source of a motor vehicle that is subject to §114.50(a) of this title (relating to Vehicle Emissions Inspection Requirements).

(9) [~~(5)~~] Fleet vehicle--A motor vehicle operated as one of a group that consists of more than ten motor vehicles and that is owned and operated by a public or commercial entity or by a private entity other than a single household.

(10) Hybrid motor vehicle--A motor vehicle that draws propulsion energy from both gasoline or conventional diesel fuel and a rechargeable energy storage system.

(11) [~~(6)~~] LIRAP--Low income vehicle repair assistance, retrofit, and accelerated vehicle retirement program.

(12) Motor vehicle--A fully self-propelled vehicle having four wheels that has as its primary purpose the transport of a person, persons, or property on a public highway.

(13) [~~(7)~~] Participating county--An affected county in which the commissioners court by resolution has chosen to implement a low income vehicle repair assistance, retrofit, and accelerated vehicle retirement program authorized by Texas Health and Safety Code, §382.209.

(14) Qualifying motor vehicle--A motor vehicle that meets the requirements of replacement vehicle in this section.

(15) [~~(8)~~] Recognized emissions repair facility--An automotive repair facility as provided [~~defined~~] in 37 Texas Administrative Code [~~TAC,~~] §23.93, relating to Vehicle Emissions Inspection Requirements.

(16) [~~(9)~~] Recycled--Conversion of metal or other material into raw material products that have prepared grades; [~~and~~] an existing or potential economic value; and using these raw material products in the production of new products.

(17) [~~(10)~~] Replacement vehicle--A vehicle that is in a class or category of vehicles that has been certified to meet federal Tier 2, Bin 5 or cleaner Bin certification under 40 Code of Federal Regulations §86.1811-04, as published in the February 10, 2000, *Federal Register*; has a gross vehicle weight rating of less than 10,000 pounds; the total cost does not exceed $25,000 and has passed a Department of Public Safety motor vehicle safety inspection or safety and emissions inspection within the 15-month period before the application is submitted [~~has a valid Texas Department of Public Safety or safety and emissions inspection~~].

(18) [~~(11)~~] Retrofit--To equip, or the equipping of, an engine or an exhaust or fuel system with new, emissions-reducing parts or equipment designed to reduce air emissions and improve air quality, after the manufacture of the original engine or exhaust or fuel system, so long as the parts or equipment allow the vehicle to meet or exceed state and federal air emissions reduction standards.

(19) [~~(12)~~] Retrofit equipment--Emissions-reducing equipment designed to reduce air emissions and improve air quality that is approved by the United States Environmental Protection Agency [~~EPA~~] and is installed after the manufacture of the original engine, exhaust, or fuel system.

(20) Total cost--Means the total amount money paid or to be paid for the purchase of a motor vehicle as set forth as the sales price in the form entitled "Application for Texas Certificate of Title" promulgated by the Texas Department of Transportation. In a transaction that does not involve the use of that form, the term means an amount of money that is equivalent, or substantially equivalent, to the amount that would appear as the sales price on the application for Texas Certificate of Title if that form were used.

(21) Truck--A motor vehicle having a gross vehicle weight rating of less than 10,000 pounds and designed primarily for the transport of persons and cargo.

(22) [~~(13)~~] Vehicle--A motor vehicle subject to §114.50(a) of this title (relating to Vehicle Emissions Inspection Requirements).

(23) [~~(14)~~] Vehicle owner--For the purposes of repair assistance or retrofit, the person who holds the Certificate of Title for the vehicle and/or the operator who is granted possession and is authorized to make repairs under a lease or purchase agreement; and for the purposes of accelerated retirement, the person who holds the Certificate of Title for the vehicle.

(24) [~~(15)~~] Vehicle retirement facility--A facility that, at a minimum, is licensed, certified, or otherwise authorized by the Texas Department of Transportation to destroy, recycle, or dismantle vehicles.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 10, 2007.

TRD-200703514
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 239-2461

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SUBCHAPTER C. VEHICLE INSPECTION AND MAINTENANCE; LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM; AND EARLY ACTION COMPACT COUNTIES

DIVISION 2. LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM

30 TAC §§114.62, 114.64, 114.66, 114.70

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and §5.013, which states the commission's authority over various statutory programs. The amendments are also proposed under THSC, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.013, which authorizes the commission to designate air quality control regions in order to implement air quality standards; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §§382.201 - 382.218 and 382.301 - 382.302, which provide the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of the federal Clean Air Act (42 United States Code, §§7401 *et seq*.), to coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of the National Ambient Air Quality Standards, and to fund the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP). Finally, the amendments are proposed as part of the implementation of SB 12, 80th Legislature, 2007.

The adopted amendments implement TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.019, 382.201 - 382.218 and 382.301 - 382.302; and provisions of SB 12, 80th Legislature, 2007.

§114.62. LIRAP Funding.

(a) - (c) (No change.)

(d) In a county with a vehicle emissions inspection and maintenance program under §382.202 or §382.302, Health and Safety Code, not more than 10 percent of the money provided for LIRAP may be used for administration of the program.

§114.64. LIRAP Requirements.

(a) Implementation. Upon receiving a written request to implement a Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) by a county commissioners court, the executive director shall authorize the implementation of a LIRAP in the requesting county. The executive director and county shall enter into a grant contract for the implementation of the LIRAP.

(1) (No change.)

(2) A participating county may contract with an entity approved by the executive director for services necessary to implement the LIRAP. A participating county or its designated entity shall [~~must~~] demonstrate to the executive director that, at a minimum, the county or its designated entity has provided for appropriate measures for determining applicant eligibility and repair effectiveness and ensuring against fraud.

(3) (No change.)

(b) Repair and retrofit assistance. A LIRAP must [~~shall~~] provide for monetary or other compensatory assistance to eligible vehicle owners for repairs directly related to bringing certain vehicles that have failed a required emissions test into compliance with emissions requirements or for installing retrofit equipment on vehicles that have failed a required emissions test, if practically and economically feasible, in lieu of or in combination with repairs performed to bring a vehicle into compliance with emissions requirements. Vehicles under the LIRAP must be repaired or retrofitted at a recognized emissions repair facility. To determine eligibility, the participating county or its designated entity shall make applications available for LIRAP participants. The application, at a minimum, must require the vehicle owner to demonstrate that:

(1) - (4) (No change.)

(5) the vehicle owner's net family income is at or below 300 percent [~~200%~~] of the federal poverty level; and

(6) (No change.)

(c) Accelerated vehicle retirement. A LIRAP must [~~shall~~] provide monetary or other compensatory assistance to eligible vehicle owners to be used toward the purchase of a replacement vehicle.

(1) To determine eligibility, the participating county or its designated entity shall make applications available for LIRAP participants. The application, at a minimum, must require the vehicle owner to demonstrate that:

(A) [~~(1)~~] the vehicle meets the requirements under subsection (b)(1) - (3) and (5) of this section;

(B) [~~(2)~~] the vehicle has passed a DPS motor vehicle safety or safety and emissions inspection within 15 months prior to application submittal; and

(C) [~~(3)~~] any other requirements of the participating county or the executive director are met.

(2) Pre-1996 model year vehicles that pass the required United States Environmental Protection Agency (EPA) Start-Up Acceleration Simulation Mode (ASM) standards emissions test, but would have failed the EPA Final ASM standards emissions test, or some other criteria determined by the commission, may be eligible for accelerated vehicle retirement and replacement compensation under this section.

(3) Notwithstanding the vehicle requirement provided under subsection (b)(1) of this section, a vehicle that is gasoline powered and is at least 10 years old as determined from the current calendar year (i.e., 2007 minus 10 years equals 1997) and meets the requirements under subsection (b)(2), (3), and (5) of this section, may be eligible for accelerated vehicle retirement and compensation.

(4) Replacement vehicles must:

(A) be in a class or category of vehicles that has been certified to meet federal Tier 2, Bin 5 or cleaner Bin certification under 40 Code of Federal Regulations §86.1811-04, as published in the February 10, 2000, *Federal Register;*

(B) have a gross vehicle weight rating of less than 10,000 pounds;

(C) be a vehicle the total cost of which does not exceed $25,000; and

(D) have passed a DPS motor vehicle safety inspection or safety and emissions inspection within the 15-month period before the application is submitted.

(d) Compensation. The participating county shall [~~must~~] determine eligibility and approve or deny the application promptly. If the requirements of subsection (b) or (c) of this section are met and based on available funding, the county shall authorize monetary or other compensations to the eligible vehicle owner.

(1) Compensations must be:

(A) (No change.)

(B) based on vehicle type and model year of [~~no more than $1,000 and no less than $600 per vehicle, including diagnostics tests, to be used toward~~] a replacement vehicle for the accelerated retirement of a vehicle meeting the requirements under this subsection. The maximum amount toward a replacement vehicle, shall not exceed:

(i) $3,000 for a replacement car of the current model year or previous three model years, except as provided by clause (iii) of this subparagraph;

(ii) $3,000 for a replacement truck of the current model year or the previous two model years, except as provided by clause (iii) of this subparagraph;

(iii) $3,500 for a replacement hybrid vehicle of the current model year or the previous model year.

(2) (No change.)

(3) For accelerated vehicle retirement, provided that the compensation [~~maximum and minimum~~] levels in paragraph (1)(B) of this subsection are met and minimum eligibility requirements under subsection (c) of this section are met, a participating county may set a specific level of compensation or implement a level of compensation schedule that allows flexibility. The following criteria may be used for determining the amount of financial assistance:

(A) - (F) (No change.)

(e) Reimbursement for repairs and retrofits. A participating county shall [~~must~~] reimburse the appropriate recognized emissions repair facility [~~or vehicle retirement facility~~] for approved repairs and[~~,~~]retrofits[~~, or vehicle retirements~~] within five business [~~30 calendar~~] days of receiving an invoice that meets the requirements of the county or designated entity.

(1) A participating county shall provide an electronic means for distributing vehicle repair funds once all program criteria have been met.

(2) Repaired or retrofitted vehicles must pass a DPS safety and emissions inspection before the recognized emissions repair facility is reimbursed. In the event that the vehicle does not pass the emissions retest after diagnosed repairs are performed, the participating county has the discretion, on a case-by-case basis, to make payment for diagnosed emissions repair work performed.

(f) Reimbursements for replacements. A participating county shall ensure that funds are transferred to a participating automobile dealership no later than five business days after the county receives proof of the sale and any administrative documents that meet the requirements of the county or designated entity, including certification that the retired vehicle has been destroyed as required by §114.66 of this title (relating to Disposition of Retired Vehicle).

(1) A participating county shall provide an electronic means for distributing replacement funds to a participating automobile dealership once all program criteria have been met. The replacement funds may be used as a down payment toward the purchase of a replacement vehicle. Participating automobile dealers shall be located in the State of Texas. Participation in LIRAP by an automobile dealer is voluntary.

(2) Participating counties shall develop a document for confirming a person's eligibility for purchasing a replacement vehicle and for tracking such purchase.

(A) The document shall include at a minimum, the full name of applicant, the vehicle identification number of the retired vehicle, expiration date of the document, the program administrator's contact information, and the amount of money available to the participating vehicle owner.

(B) The document shall be presented to a participating dealer by the person seeking to purchase a replacement vehicle before entering into negotiations for a replacement vehicle.

(C) A participating dealer who relies on the document issued by the participating county has no duty to confirm the eligibility of the person purchasing a replacement vehicle in the manner provided by this section.

§114.66. Disposition of Retired Vehicle.

(a) Vehicles retired under a Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) may not be resold or reused in their entirety in this or another state. Any dismantling of vehicles or salvaging of steel under this section must be performed at a facility located in the state of Texas.

(b) The vehicle must be:

(1) destroyed;

(2) recycled;

(3) dismantled and its parts sold as used parts or used in the LIRAP;

(4) placed in a storage facility and subsequently destroyed, recycled, or dismantled within 12 months of the vehicle retirement date and its parts sold or used in the LIRAP; or

(5) repaired, brought into compliance, and used as a replacement vehicle under this division. Not more than 10% of all vehicles eligible for retirement may be used as replacement vehicles.

(c) Notwithstanding subsection (b) of this section, the dismantler of a vehicle shall destroy the emissions control equipment and engine, certify those parts have been destroyed and not resold into the market place. The dismantler shall remove any mercury switches in accordance with any state and federal laws.

(d) The dismantler shall provide certification that the vehicle has been destroyed to the automobile dealer from whom the dismantler has taken receipt of a vehicle for retirement.

(e) The dismantler shall provide the residual scrap metal of a retired vehicle under this section to a recycling facility at no cost, except the cost of transportation of the residual scrap metal to the recycling facility.

§114.70. Records, Audits, and Enforcement.

(a) A participating county shall [~~must~~] submit quarterly audit reports to ensure that the funds provided to implement the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) have been used in accordance with requirements of this division. The quarterly reports (September - November, December - February, March - May, June - August) must be transmitted to the executive director in paper copies or in an electronic database format to be determined by mutual agreement between the state and the participating county no later than 30 days after the end of the quarter.

(b) - (c) (No change.)

(d) A participating county, its designated entity, a participating recognized emissions repair facility, and a participating vehicle retirement facility shall [~~must~~] allow the executive director to conduct audits and inspections.

(e) (No change.)

(f) A person who causes, suffers, allows, or permits a violation of §114.66(c) and (d) of this title is subject to a civil penalty under Subchapter D, Chapter 7, Water Code, for each violation. A separate violation occurs with each fraudulent certification or prohibited resale.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 10, 2007.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2461

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SUBCHAPTER K. MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 3. DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM FOR ON-ROAD AND NON-ROAD VEHICLES

30 TAC §114.622

The Texas Commission on Environmental Quality (commission) proposes an amendment to §114.622.

The amended section is proposed to be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Senate Bill 12 (SB 12), 80th Legislature, 2007, amended the Texas Health and Safety Code, Chapter 386, Texas Emissions Reduction Plan (TERP) Program. Most of the new provisions add to existing project categories and do not require amendment of the rules for implementation. The TERP Guidelines will be revised to include the additional grant criteria established by SB 12.

The proposed rulemaking amends §114.622 to implement the cost-effectiveness increase from $13,000 per ton of nitrogen oxides reduced to $15,000 per ton under Texas Health and Safety, §386.106(a), as required by SB 12. Senate Bill 12 also authorizes the commission to designate highways and roadways or portions of a highway or roadway on which travel by grant-funded vehicles may count towards the requirement that vehicles be operated at least 75 percent of the annual miles in the nonattainment areas and affected counties.

In addition to the amendment proposed to implement SB 12, the rule will be amended to remove the option for grant recipients to permanently remove from the State of Texas the old equipment or engines replaced under a grant project. With this amendment, grant recipients will be required to recycle or scrap the old equipment or engine. This amendment has been implemented for grants issued beginning in fiscal year 2007 and the rule change is intended to align the rules with current practice.

SECTION BY SECTION DISCUSSION

The proposed amendment would increase the cost-effectiveness of eligible projects and allow the commission to designate vehicle travel on highways and roadways to count towards the percentage of use requirement. The proposed amendment will also omit the option to move replaced equipment from the State of Texas. For proposed projects that include the replacement or repower of equipment, the old equipment or engine must be recycled or scrapped.

§114.622. Incentive Program Requirements.

The proposed amendment to §114.622(b) allows the commission to designate highways and roadways or portions of a highway or roadway on which travel by grant-funded vehicles may count towards the requirement that vehicles be operated at least 75 percent of the annual miles in the nonattainment areas and affected counties. Section 114.622(b) currently establishes a usage commitment of 75 percent for vehicle miles traveled or hours of operation to occur in a nonattainment area or affected county.

The proposed amendment to §114.622(c) requires grant recipients to recycle or permanently scrap old equipment and engines. Section 114.622(c) currently includes an option for grant recipients to permanently remove from the state equipment or engines

replaced under the program, in lieu of recycling or scrapping. Beginning with grants issued in fiscal year 2007, the commission has not allowed grant recipients to use the removal option and has required that the old equipment or engine to be recycled or scrapped. After evaluating the implementation of the replacement and repower grants for several years, staff found that it was difficult to ensure that old equipment and engines were actually removed from the state and, if removed, would not be returned to the state in the future. Staff determined that the best way to ensure that the reductions in emissions of nitrogen oxides are achieved is to not allow this option and to require that the old equipment and engines be recycled or scrapped.

The proposed amendment to §114.622(d) increases the cost-effectiveness for projects from the current $13,000 per ton of nitrogen oxides emissions reduced to $15,000 per ton of nitrogen oxides emissions reduced.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency and or other units of state or local government due to administration or enforcement of the proposed rule. The proposed rule implements portions of SB 12, 80th Legislature, 2007, Regular Session, relating to the TERP program. The proposed amendment would expand the authorized area of use of grant-funded vehicles, ensure old equipment and engines are recycled or scrapped, and increase the cost-effectiveness limits for TERP grant funded projects.

Senate Bill 12 amended Texas Health and Safety Code, Chapter 386, relating to the TERP program, including changes to the diesel emissions reduction incentive grant programs. The proposed amendment would implement portions of SB 12 by allowing travel on highways and roadways designated by the commission, to count towards the requirement that grant-funded vehicles operate at least 75 percent of the annual miles in the eligible counties; and raise the cap of the cost-effectiveness criteria for grant funded projects from $13,000 per ton of nitrogen oxides reduced to $15,000 per ton.

In addition to the changes required under SB 12, staff recommends changes to §114.622 to remove the option that vehicles, equipment, and engines replaced under the program may be removed from the state in lieu of being recycled or scrapped.

The proposed amendment will expand the authorized area of use for grant funded vehicles, and this change is expected to result in a greater number of vehicle owners that may qualify for a grant. In addition, the proposed rule will increase the cost-effectiveness limits for eligible projects potentially bringing more types of projects into the program. As a result of both of these changes, the pool of eligible grant applicants is anticipated to expand. The agency was appropriated approximately $147 million in fiscal year 2008 and approximately $150 million in fiscal year 2009 for incentive payments for the Diesel Emissions Reduction Program. In addition, the agency was appropriated approximately $2.2 million in fiscal year 2008 and $2.2 million in fiscal year 2009 to administer the program. The proposed rule changes are not anticipated to affect the overall grant funding amounts nor costs to the agency for implementation of the program.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be an improvement in air quality due to an expanded pool of eligible grant applicants for diesel emissions reduction incentive grants.

No fiscal implications are anticipated for businesses and individuals as a result of the proposed rule. The proposed rulemaking is related to a voluntary incentive grant program. The changes expand the authorized area of use of grant-funded vehicles, ensure old equipment and engines are recycled or scrapped, and increase the cost-effectiveness limits for eligible grants. The proposed changes do not directly impact businesses and individuals, except to the extent those entities may apply for a grant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are expected for small or micro-businesses as a result of the proposed rule. Participation in the program is voluntary. The proposed changes do not directly impact businesses and individuals, except to the extent those entities may apply for a grant.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rule action is not subject to §2001.0025 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed amendment to Chapter 114 modifies the existing rules in accordance with SB 12, 80th Legislature, which amended Texas Health and Safety Code, Chapter 386. The proposed rule amendment is part of a voluntary incentive program with the goal of reducing diesel emissions and as such, the proposed rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, a regulatory impact analysis is not required because the proposed rule does not meet any of the four applicability criteria for requiring a regulatory analysis of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225 applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by fed-

eral law, and the proposed technical requirements are consistent with applicable federal standards. In addition, this rulemaking does not exceed an express requirement of state law and is not proposed solely under the general powers of the agency, but is specifically authorized by the provisions cited in the STATUTORY AUTHORITY section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the proposed rule is subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with SB 12, 80th Legislature. The amendment implements a voluntary program and only affects motor vehicles and equipment which are not considered to be private real property. Therefore, promulgation and enforcement of this proposed rule is neither a statutory nor a constitutional taking because it does not affect private real property. Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), concerning rules subject to the Texas Coastal Management Program (CMP) and will therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this action for consistency and determined the rulemaking for Chapter 114 does not impact any CMP goals or policies, because it adds criteria to a voluntary incentive grant program and does not govern air pollution emissions. Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARINGS

Public hearings on this proposal will be held in Austin, Texas, on September 11, 2007, at 11:00 a.m., in Building F, Room 2210, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle; in Houston, Texas, on September 11, 2007, at 3:30 p.m. at the Houston-Galveston Area Council located at 3555 Timmons Lane, Suite 120, Room A; and in Arlington, Texas, on September 11, 2007, at 3:30 p.m. at the North Central Texas Council of Governments at 616 Six Flags Drive, Centerpoint II, in the Metroplex Conference Room. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons planning to attend the hearings, who have special communication or other accommodation needs, should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at http://www5.tceq.state.tx.us/rules/ecomments. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-022-114-EN. The comment period closes September 12, 2007. Copies of the proposed rule can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Donna Huff, Air Quality Division, at (512) 239-6628.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.102, which provides the commission with the general powers to carry out its duties under the Texas Water Code; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also proposed under Texas Health and Safety Code, Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; §382.002, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property: §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and Chapter 386, which establishes the TERP. Finally, the amendment is proposed as part of the implementation of SB 12, 80th Legislature, 2007.

The proposed amendment implements Texas Clean Air Act, §§382.002, 382.011, 382.012, 382.017, Chapter 386 of the Texas Health and Safety Code, and SB 12, 80th Legislature, 2007.

§114.622. Incentive Program Requirements.

(a) (No change.)

(b) For a proposed project as listed in subsection (a) of this section, other than a project involving a marine vessel or engine, not less than 75% of vehicle miles traveled or hours of operation projected for the five years immediately following the award of a grant must be projected to take place in a nonattainment area or affected county of this state. The commission may also allow vehicle travel on highways and roadways, or portions of a highway or roadway, designated by the commission and located outside a nonattainment area or affected county to count towards the percentage of use requirement.

(c) For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled or [~~,~~] scrapped [~~, or otherwise permanently removed from the State of Texas~~].

(d) To be eligible for a grant, the cost-effectiveness of a proposed project as listed in subsection (a) of this section, except for infrastructure projects and infrastructure purchases that are part of a broader retrofit, repower, replacement, or add-on equipment project, must not exceed a cost-effectiveness of $15,000 [~~$13,000~~] per ton of NO_x emissions reduced. The commission may set lower cost-effectiveness limits as needed to ensure the best use of available funds. The commission

may also base project selection decisions on additional measures to evaluate the effectiveness of projects in reducing NO_x emissions in relation to the funds to be awarded.

(e) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 10, 2007.

TRD-200703517
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 239-6087

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 9. PUBLIC SAFETY COMMUNICATIONS

SUBCHAPTER D. SILVER ALERT NETWORK

37 TAC §§9.31 - 9.34

The Texas Department of Public Safety (DPS) proposes new Subchapter D, §§9.31 - 9.34, relating to the Silver Alert Network. The new sections are necessary to promulgate the policies and procedures of DPS governing the statewide coordination of the Silver Alert Network.

New §9.31 details the need for statewide coordination of the Silver Alert Network in order to maintain a high level of effectiveness; §9.32 describes local law enforcement responsibility; §9.33 describes the department's responsibility; and §9.34 describes the activation and deactivation of the Silver Alert Network.

The new sections are necessary to fully implement Tex. S.B. 1315, Acts 2007, 80th Leg., R.S.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first-five year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to ensure the high level of effectiveness of the statewide emergency response system for senior citizens. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

The department has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Mike Gougler, Assistant Commander, Criminal Intelligence Service, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0420, (512) 424-5028.

The new sections are proposed pursuant to Texas Government Code, §411.383(b), which requires the director to adopt rules and issue directives as necessary to ensure proper implementation of the alert system, with the rules and directives to include procedures to be used by local law enforcement; a description of the circumstances under which local law enforcement is required to report a missing senior citizen; and the procedures to be used to notify designated media outlets in Texas.

Texas Government Code, §411.383(b) is affected by this proposal.

§9.31. Purpose of Silver Alert Network.

(a) The Silver Alert Network ("network") was developed as a statewide emergency response system for certain missing senior citizens. The network is designed to be activated when a missing senior citizen with a diagnosed impaired mental condition poses a credible threat to his or her health and safety.

(b) A diagnosed impaired mental condition means a mental condition or disorder as defined by the current version of the Diagnostic and Statistical Manual as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress or disability or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this individual's current condition presents a significant level of impairment to pose a credible threat to the individual's health and safety. The condition, e.g., Alzheimer's disease or dementia, shall be documented by a medical or mental health professional.

(c) Activation of the network outside the established criteria will ultimately cause the public to disregard the notifications, and the system will lose effectiveness. In order to maintain a high level of effectiveness, the department and local law enforcement must ensure that the circumstances justifying activation are accurately evaluated in order to implement the network in a responsible manner.

(d) Network activations must be limited to those instances where the statutory criteria for activation are clearly established by the specific facts of the case. The department has complete discretion in making the final determination about the activation of the Silver Alert Network.

§9.32. Local Law Enforcement Responsibility.

A local law enforcement agency with jurisdiction over the investigation of a missing senior citizen may submit a request for activation of the Silver Alert Network. The request must be submitted on the Silver Alert Request Form (SA_1). A local law enforcement agency may submit the form after it has verified that all statutory criteria for activation are clearly established by the specific facts of the case. Local law enforcement shall provide documentation of a diagnosed impaired mental condition with the request for activation.

Figure: 37 TAC §9.32

§9.33. Department Responsibility.

The department shall review a request for activation to confirm that the request meets the statutory criteria for activation. The department will not activate the network until the local law enforcement agency has clearly established that all statutory criteria for activation are satisfied.

§9.34. Activation and Deactivation.

Silver Alert Network activations and deactivations will be made according to the procedures specified in the current Silver Alert standard operating procedures.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 10, 2007.

TRD-200703516
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 424-2135

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PART 3. TEXAS YOUTH COMMISSION

CHAPTER 93. YOUTH RIGHTS AND REMEDIES

The Texas Youth Commission (the commission) simultaneously proposes the repeal of §93.31, concerning Complaint Resolution System, and new §93.31, concerning Youth Grievance System. The new section will establish the rules and control measures for the operation of the commission's re-designed youth grievance system.

The grievance system will provide for additional methods for filing grievances directly with off-site staff. The system will also include a new conference request provision for youth, whereby a youth may informally discuss grievances with a staff member selected by the youth. The new system also provides enhanced control measures to ensure the security of grievance drop boxes. The new rule establishes that the commission will provide information on how to file grievances to youth and their families each time a youth arrives at a TYC placement, and confirmation of receipt to a person who files a youth grievance.

Robin McKeever, Division Director for Finance, Business, and Maintenance, has estimated no significant fiscal impacts for state or local government as a result of enforcing or administering the new section for the first five-year period the new section is in effect.

DeAnna Lloyd, Manager of Policy, Grants, and Accreditation, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the safety and positive adjustment of youth in the commission's custody through enhancement of measures for reporting and resolution of grievances. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the new section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Manager of Policy, Grants, and Accreditation, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

37 TAC §93.31

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Youth Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed repeal affects the Human Resources Code, §61.034.

§93.31. Complaint Resolution System.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703586
Dimitria D. Pope
Acting Executive Director
Texas Youth Commission
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 424-6014

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37 TAC §93.31

The new section is proposed under the Human Resources Code, §61.045, which assigns to the commission the responsibility for the welfare and rehabilitation of the children in its care, and §61.0422, which requires the commission to keep information about each written complaint filed with the commission by a child receiving services from the commission or the child's parent or guardian.

The proposed rule affects the Human Resources Code, §61.034.

§93.31. Youth Grievance System.

(a) Policy.

(1) Youth, parents or guardians of youth, and youth advocates have a right to file grievances concerning the care, treatment, services, or conditions provided for youth under the jurisdiction of the Texas Youth Commission (TYC). TYC will resolve grievances in a prompt, fair, and thorough manner.

(2) TYC recognizes that informal discussions between staff and youth are a key element in resolving issues or concerns at the earliest stage and contribute to a positive facility culture. TYC will make staff available to meet with youth whenever possible, limited only by consideration for facility order and the safety of youth and staff.

(b) General Rules.

(1) There is no limitation on the number or subject matter of grievances a person is permitted to file.

(2) Each residential facility and parole office will provide a time, place, and manner in which youth, parents/guardians, or youth advocates may file grievances and a staff member who is available to provide assistance in writing and filing grievances.

(3) In residential facilities, reasonable restrictions may be imposed on the time, place, and manner of submission of grievances filed by youth to preserve order and maintain attention during instructional or treatment activities.

(4) Retaliation or interference by staff concerning the filing or resolution of grievances will not be tolerated and is grounds for disciplinary action up to and including termination of employment.

(5) To the extent possible, grievances will remain confidential. The identity of a person filing a grievance will not be shared with staff members other than those necessary to resolve the grievance. Youth files will not contain any reference to the filing of grievances.

(6) Youth will be informed of the system for filing and resolving grievances upon arrival at each placement. Notices containing information on the grievance system will be posted in English and Spanish in conspicuous areas throughout residential facilities and parole offices. Parents/guardians will be provided information on the grievance resolution system and local contact information upon a child's admission to TYC and each subsequent placement.

(7) Persons with limited English proficiency may file grievances in languages other than English.

(8) TYC will provide confirmation of receipt, including a tracking number, to grievants having the legal right to access confidential youth information.

(9) Upon written request, a parent/guardian of a youth under 18 years of age will be provided with a summary of grievances filed by his/her child. A youth 18 years of age or older must provide consent in order to release a grievance summary to his/her parent/guardian.

(c) Youth Requests for Conference with Staff.

(1) Youth assigned to residential facilities may submit a written request for a conference with any staff member assigned to his/her facility as an informal means of addressing issues or concerns. Conferences with youth will be scheduled at the earliest opportunity that does not jeopardize youth or staff safety, facility order, or an ongoing investigation. Youth will be notified in cases where the request cannot be honored promptly.

(2) A youth may elect to file a grievance if he/she is dissatisfied with the result of the staff conference or the issue(s) raised in connection with the conference request cannot be resolved by his/her selected staff member. However, in no case will a youth be required to submit a request for conference as a preliminary step prior to submitting a grievance.

(d) Grievances.

(1) Methods for Filing a Grievance.

(A) Incident Reporting Center. Any person may submit a grievance to the TYC Incident Reporting Center (IRC) by telephone, email, fax, or postal service. See TYC's internet website for contact information. Subject to limitations on time, place, and manner, a youth in a residential placement will be allowed confidential telephone access in order to contact the IRC.

(B) In-Person to TYC Staff. Any person who is unable or unwilling to submit a grievance in writing may verbally communicate a grievance to TYC staff.

(C) Youth Grievance Forms.

(i) All youth under TYC jurisdiction must have access to pre-numbered grievance forms.

(ii) In residential facilities, a youth will be selected in each living unit or area to distribute grievance forms.

(iii) In residential facilities, secure drop boxes will be provided in easily accessible locations for youth to submit completed grievance forms. Access to the drop boxes is restricted to staff members designated by the executive director or designee.

(iv) A youth will be provided with a copy of each grievance he/she submits.

(2) Resolution of a Grievance.

(A) Grievances will be promptly collected, reviewed and assigned for response. Grievances will be screened to identify issues which require expedited resolution in order to avoid substantial loss or harm if delayed.

(B) Each grievance will be assigned to a staff member who is not directly involved in the grievance and has the authority to implement an appropriate corrective measure or has knowledge or access to provide clarifying information. The assigned staff member will provide a written response to the grievant.

(3) Appeal of a Grievance Resolution.

(A) A grievant may file an appeal if dissatisfied with the response. TYC will designate a staff member to provide a written response to the appeal. If the grievant is dissatisfied with the appeal response, he/she may submit an appeal to the executive director or designee.

(B) A grievant may submit a direct appeal to the executive director or designee if no written response is received within 15 work days after submitting a grievance.

(C) An appeal to the executive director or designee exhausts all administrative remedies on the issue(s) raised in the grievance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703587
Dimitria D. Pope
Acting Executive Director
Texas Youth Commission
Earliest possible date of adoption: September 23, 2007
For further information, please call: (512) 424-6014

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.9

The Texas Appraiser Licensing and Certification Board withdraws the proposed amendments to §153.9 which appeared in the March 30, 2007, issue of the *Texas Register* (32 TexReg 1825).

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703589
Troy Beaulieu
Board Attorney
Texas Appraiser Licensing and Certification Board
Effective date: August 13, 2007
For further information, please call: (512) 465-3959

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PART 25. TEXAS STRUCTURAL PEST CONTROL BOARD

CHAPTER 593. LICENSES

22 TAC §593.1

The Texas Department of Agriculture, on behalf of the Texas Structural Pest Control Board, withdraws the proposed amendments to §593.1 which appeared in the February 16, 2007, issue of the *Texas Register* (32 TexReg 606).

Filed with the Office of the Secretary of State on August 9, 2007.

TRD-200703472
Dolores Alvarado Hibbs
General Counsel, Texas Department of Agriculture
Texas Structural Pest Control Board
Effective date: August 9, 2007
For further information, please call: (512) 463-4075

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PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES
SUBCHAPTER D. APPLICATIONS, EXAMINATIONS, AND LICENSING

22 TAC §661.57

The Texas Board of Professional Land Surveying withdraws new §661.57 which appeared in the June 22, 2007 issue of the *Texas Register* (32 TexReg 3833).

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703534
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: August 13, 2007
For further information, please call: (512) 239-5263

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CHAPTER 663. STANDARDS OF RESPONSIBILITY AND RULES OF CONDUCT
SUBCHAPTER B. PROFESSIONAL AND TECHNICAL STANDARDS

22 TAC §663.17

The Texas Board of Professional Land Surveying withdraws the proposed amendments to §663.17 which appeared in the June 22, 2007 issue of the *Texas Register* (32 TexReg 3835).

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703555
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: August 13, 2007
For further information, please call: (512) 239-5263

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 353. MEDICAID MANAGED CARE

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §353.2

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §353.2, Definitions, to update the definition of Value-added Services. Section 353.2 is adopted with minor changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4128). The text of the rule will be republished. The amendment to "Value Added Services" has not changed from the proposed version; however, the numbering of the definition was incorrect. "Value-Added Services" should have fallen under number (72) but was inadvertently proposed under number (67). Therefore, the rule is being republished for numerical clarification.

The term Value-added Services is used to define additional services that Medicaid managed care organizations provide to their Medicaid members to enhance the value of the services that are required to be provided under the managed care contracts. Senate Bill (S.B.) 10, 80th Legislature, Regular Session, 2007, requires HHSC to actively encourage Medicaid managed care organizations that contract with HHSC to offer value-added benefits, including health care services or benefits or other types of services that have the potential to improve the health status of enrollees in the plans. S.B. 10 specifies that this change applies to managed care contracts effective September 1, 2007.

The amendment to §353.2(72) broadens the scope of the Value-added Services that may be offered by Medicaid managed care organizations to their enrollees. The current rule states that Value-added Services must be health care services. To align the rule with S.B. 10, the amended rule states that Value-added Services may be health care services or positive incentives that promote healthy lifestyles and improve health outcomes.

HHSC did not receive comments regarding the proposed rule during the 30-day comment period, which included a public hearing on July 11, 2007.

The amendments are adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021 and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §533.002, which directs HHSC to implement the Medicaid managed care program.

§353.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the content clearly indicates otherwise.

(1) 1915(c) Nursing Facility Waiver--The Medicaid waiver program that provides home and community based services to aged, blind and disabled clients as cost-effective alternatives to institutional care in nursing homes.

(2) Action--An Action is defined as:

(A) The denial or limited authorization of a requested Medicaid service, including the type or level of service;

(B) the reduction, suspension, or termination of a previously authorized service;

(C) the failure to provide services in a timely manner;

(D) the denial in whole or in part of payment for a service;

(E) the failure of an MCO or the ICM Contractor to act within the timeframes set forth by the Commission and state and federal law; or

(F) for a resident of a rural area with only one MCO, the denial of a Medicaid member's request to obtain services outside the network.

(3) Acute Care--Preventive care, primary care, and other medical or behavioral health care provided for a condition having a relatively short duration. In the ICM Program, acute care services do not include behavioral health services in the Dallas service area.

(4) Acute Care Hospital--A hospital that provides acute care services.

(5) Adverse Determination--A determination by an MCO or the ICM Contractor that the health care services and behavioral health services furnished, or proposed to be furnished, to a patient are not medically necessary or appropriate.

(6) Agreement or Contract--The formal, written, and legally enforceable contract and amendments thereto between the Commission and an MCO or the ICM Contractor.

(7) Allowable Revenue--All managed care revenue received by the MCO pursuant to the contract during the contract period, including retroactive adjustments made by HHSC. This would include any revenue earned on Medicaid managed care funds such as investment income, earned interest, or third party administrator earnings from services to delegated networks.

(8) Appeal--The formal process by which a member or his or her representative requests a review of the MCO's action or the ICM Contractor's action.

(9) Behavioral Health Services--Covered services for the treatment of mental health or chemical dependency disorders.

(10) Capitation Rate--A fixed predetermined fee paid by HHSC to the MCO each month, in accordance with the contract, for each enrolled member in exchange for which the MCO arranges for or provides a defined set of covered services to the member, regardless of the amount of covered services used by the enrolled member.

(11) Client--Any Medicaid-eligible recipient.

(12) CMS--The Centers for Medicare and Medicaid Services, which is the federal agency responsible for administering Medicare and overseeing state administration of Medicaid and the Children's Health Insurance Program (CHIP).

(13) Commission--The Texas Health and Human Services Commission.

(14) Complainant--A member, or a treating provider or other individual designated to act on behalf of the member, who files a complaint.

(15) Complaint--Any dissatisfaction expressed by a complainant, orally or in writing, to the MCO or the ICM Contractor about any matter related to the MCO or the ICM Contractor other than an action. Subjects for complaints may include, but are not limited to:

(A) the quality of care of services provided;

(B) aspects of interpersonal relationships such as rudeness of a provider or employee; and

(C) failure to respect the Medicaid member's rights.

(16) Core Service Area--The core set of service area counties defined by HHSC for the Medicaid managed care programs in which Medicaid eligibles will be required to enroll in the MCO.

(17) Covered Services--Health care services the MCO must arrange to provide to member, including all services required by the Commission, state and federal law, and all value-added services negotiated by the Commission and an MCO. Covered services include behavioral health services.

(18) Cultural Competency--The ability of individuals and systems to provide services effectively to people of various cultures, races, ethnic backgrounds, and religions in a manner that recognizes, values, affirms, and respects the worth of the individuals and protects and preserves their dignity.

(19) Day--A calendar day, unless specified otherwise.

(20) Default Enrollment--The process established by HHSC to assign a mandatory Medicaid Managed Care enrollee to an MCO when an MCO has not been selected by the client.

(21) Disproportionate Share Hospital (DSH)--A hospital that serves a higher than average number of Medicaid and other low-income patients and receives additional reimbursement from the State.

(22) Disability--A physical or mental impairment that substantially limits one or more of an individual's major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, socializing and/or working.

(23) Elective Enrollment--Selection of a PCP and MCO by a client during the enrollment period established by the Commission.

(24) Emergency Behavioral Health Condition--Any condition, without regard to the nature or cause of the condition, that in the opinion of a prudent layperson possessing an average knowledge of health and medicine:

(A) requires immediate intervention and/or medical attention without which the client would present an immediate danger to themselves or others, or

(B) renders the client incapable of controlling, knowing or understanding the consequences of his or her actions.

(25) Emergency Services--Covered inpatient and outpatient services furnished by a network provider or out-of-network provider that is qualified to furnish such services that are needed to evaluate or stabilize an emergency medical condition and/or an emergency behavioral health condition, including Post-Stabilization Care Services.

(26) Emergency Medical Condition--A medical condition manifesting itself by acute symptoms of recent onset and sufficient severity (including severe pain), such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical care could result in:

(A) placing the patient's health in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part;

(D) serious disfigurement; or

(E) serious jeopardy to the health of a pregnant woman or her unborn child.

(27) Encounter--A covered service or group of covered services delivered by a provider to a member during a visit between the member and provider. This also includes value-added services.

(28) EPSDT--The federally mandated Early and Periodic Screening, Diagnosis and Treatment program defined in Chapter 33 of Title 25 of the Texas Administrative Code. The State of Texas has adopted the name Texas Health Steps (THSteps) for its EPSDT program.

(29) EPSDT-CCP--The Early and Periodic Screening, Diagnosis and Treatment-Comprehensive Care Program, includes medically necessary benefits for children under 21 years of age in addition to benefits available to the general Medicaid population.

(30) Exclusive Provider Benefit Plan (EPBP)--A Managed Care Plan that complies with 28 TAC §§3.9201 - 3.9212, relating to the Texas Department of Insurance's requirements for exclusive provider benefit plans, and contracts with the Commission to provide CHIP or Medicaid coverage.

(31) Experience Rebate--The portion of the MCO's net income before taxes that is returned to the State in accordance with 28 TAC Chapter 11, Subchapter S, relating to solvency standards for Medicaid MCOs.

(32) Fair Hearing--The process adopted and implemented by HHSC in Chapter 357 of this Title, relating to Medical fair hearing rules, in compliance with federal regulations and state rules relating to Medicaid fair hearings.

(33) Federally Qualified Health Center (FQHC)--An entity certified by CMS to meet the requirements of §1861(aa)(3) of the Social Security Act (42 U.S.C. §1395x(aa)(3)) as a Federally Qualified Health Center that is enrolled as a provider in the Texas Medicaid program.

(34) Federal Waiver--Any waiver permitted under federal law and approved by CMS that allows states to implement Medicaid managed care.

(35) Health Care Services--The acute care, behavioral health care and health-related services that an enrolled population

might reasonably require in order to be maintained in good health, including, at a minimum, emergency services and inpatient and outpatient services.

(36) Health and Human Services Commission (HHSC)--The single state agency charged with administration and oversight of the state Medicaid program. The Commission's authority is established in Chapter 531 of the Texas Government Code.

(37) Health Maintenance Organization (HMO)--An organization that holds a certificate of authority from the Texas Department of Insurance to operate as an HMO under Chapter 843 of the Texas Insurance Code, or a certified Approved Non-Profit Health Corporation formed in compliance with Chapter 844 of the Texas Insurance Code.

(38) Hospital--A licensed public or private institution as defined in the Texas Health and Safety Code at Chapter 241, relating to hospitals, or Chapter 261, relating to municipal hospitals.

(39) Integrated Care Management (ICM) Program--A Medicaid managed care plan where an ICM Contractor manages and coordinates acute care services and LTSS for eligible SSI clients and other eligible Medicaid clients.

(40) ICM Contractor--An entity under contract with HHSC and responsible for managing and coordinating acute care services and long term services and supports (LTSS) for the ICM Program. The ICM Contractor does not pay medical claims.

(41) Long Term Services and Supports (LTSS)--Services provided to members in their home or other community-based settings necessary to provide assistance with activities of daily living to allow the member to remain in the most integrated setting possible. These LTSS services include services provided to all SSI recipients under the Texas State Plan as well as those services available only to persons who qualify for 1915(c) nursing facility waiver services.

(42) Managed Care--A health delivery system in which the overall care of a patient is coordinated by or through a single provider or organization.

(43) Managed Care Organization (MCO)--An entity that has a valid Texas Department of Insurance certificate of authority to operate as an HMO under Chapter 843 of the Texas Insurance Code, an Approved Nonprofit Health Corporation under Chapter 844 of the Texas Insurance Code, or an Exclusive Provider Benefit Plan issued by an insurer licensed by the Texas Department of Insurance, as described at 28 TAC Chapter 3, Subchapter KK, relating to Exclusive Provider Benefit Plans.

(44) Managed Care Plan--includes PCCM, HMO, Exclusive Provider Benefit Plans (EPBP), and the ICM Contractor.

(45) Marketing--Any communication from an MCO to a client who is not enrolled with the MCO that can reasonably be interpreted as intended to influence the client's decision to enroll, not to enroll, or to disenroll from a particular MCO.

(46) Marketing Materials--Materials that are produced in any medium by or on behalf of the MCO or the ICM Contractor that can reasonably be interpreted as intending to market to potential members. Materials relating to the prevention, diagnosis or treatment of a medical condition are not marketing materials.

(47) Medicaid--The medical assistance program authorized and funded pursuant to Title XIX of the Social Security Act (42 U.S.C. §1396 et seq) and administered by HHSC.

(48) Medical Assistance Only (MAO)--person who qualifies financially for Medicaid but does not receive SSI payments.

(49) Medical Home--A PCP or specialty care provider who has accepted the responsibility for providing accessible, continuous, comprehensive and coordinated care to members participating in an HHSC MCO or to non-Medicare members participating in the ICM Program.

(50) Medically Necessary Behavioral Health Services--Those behavioral health services that are documented and:

(A) are reasonable and necessary for the diagnosis or treatment of a mental health or chemical dependency disorder or to improve, maintain or prevent deterioration of functioning resulting from such a disorder;

(B) are in accordance with professionally accepted clinical guidelines and standards of practice in behavioral health care;

(C) are furnished in the most appropriate and least restrictive setting in which services can be safely provided;

(D) are the most appropriate level or supply of service that can be safely provided;

(E) could not have been omitted without adversely affecting the member's mental and/or physical health or the quality of care rendered;

(F) are not experimental or investigational; and

(G) are not primarily for the convenience of the member or provider.

(51) Medically Necessary Health Services--Health services other than behavioral health services that are documented and:

(A) reasonable and necessary to prevent illness or medical conditions or provide early screening, interventions, and/or treatments for conditions that cause suffering or pain, cause physical deformity or limitations in function, threaten to cause or worsen a handicap, cause illness or infirmity of a member, or endanger life;

(B) provided at appropriate facilities and at the appropriate levels of care for the treatment of the member's medical condition;

(C) consistent with health care practice guidelines and standards that are issued by professionally recognized health care organizations or governmental agencies;

(D) consistent with the diagnoses of the condition;

(E) no more intrusive or restrictive than necessary to provide a proper balance of safety, effectiveness, and efficiency;

(F) are not experimental or investigative; and

(G) are not primarily for the convenience of the member or provider.

(52) Member--A person who is eligible for benefits under Title XIX of the Social Security Act and Medicaid, is in a Medicaid eligibility category included in the Medicaid managed care program, and is enrolled in a Medicaid managed care plan.

(53) Member Education Program--A planned program of education:

(A) concerning access to health care through the MCO or the ICM Contractor and about specific health topics;

(B) that is approved by HHSC; and

(C) is provided to members through a variety of mechanisms that must include, at a minimum, written materials and face-to-face or audiovisual communications.

(54) Member Materials--All written materials produced or authorized by the MCO or ICM Contractor and distributed to members or potential members containing information concerning the MCO or ICM Program. Member materials include, but are not limited to, member ID cards, member handbooks, provider directories, and marketing materials.

(55) Outside Regular Business Hours--As applied to FQHCs and RHCs, means before 8 a.m. and after 5 p.m. Monday through Friday, weekends, and federal holidays.

(56) Participating MCOs--Those MCOs that have a contract with the Commission to provide services to Medicaid managed care members.

(57) PCCM or Primary Care Case Management--PCCM is a managed care model allowed under federal regulations in which the Commission contracts with providers to form a managed care provider network.

(58) Post-stabilization Care Services--Covered services, related to an emergency medical condition that are provided after a Medicaid member is stabilized in order to maintain the stabilized condition, or, under the circumstances described in 42 C.F.R. §§438.114(b) and (e) and 42 C.F.R. §422.113(c)(iii) to improve or resolve the Medicaid member's condition.

(59) Primary Care Provider (PCP)--A physician or other provider who has agreed with the MCO, or the ICM Contractor to provide a medical home to members and who is responsible for providing initial and primary care to patients, maintaining the continuity of patient care, and initiating referral for care.

(60) Provider--A credentialed and licensed individual, facility, agency, institution, organization or other entity, and its employees and subcontractors, that have a Contract with the MCO or the ICM Contractor for the delivery of covered services to the MCO's or the ICM Program's members.

(61) Provider Education Program--Program of education about the Medicaid managed care program and about specific health care issues presented by the MCO or ICM Contractor to its providers through written materials and training events.

(62) Provider Network or Network--All providers that have contracted with the MCO or ICM Contractor for the applicable program.

(63) QAPI--Quality Assessment Performance Improvements.

(64) Quality Improvement--A system to continuously examine, monitor and revise processes and systems that support and improve administrative and clinical functions.

(65) Risk--The potential for loss as a result of expenses and costs of the MCO or ICM Contractor exceeding payments made by HHSC under the contract.

(66) Rural Health Clinic (RHC)--An entity that meets all of the requirements for designation as a rural health clinic under §1861(aa)(1) of the Social Security Act (42 U.S.C. §1395x(aa)(1)) and is approved for participation in the Texas Medicaid program.

(67) Service Area--The counties included in any HHSC-defined core service area as applicable to each MCO or the ICM Contractor.

(68) Significant Traditional Provider (STP)--Providers identified by HHSC as having provided a significant level of care to the target population. DSH are also Medicaid STPs.

(69) Supplemental Security Income (SSI)--The federal cash assistance program of direct financial payments to the aged, blind, and disabled administered by the Social Security Administration (SSA) under Title XVI of the Social Security Act. All persons who are certified as eligible for SSI in Texas are eligible for Medicaid. Local SSA claims representatives make SSI eligibility determinations. The transactions are forwarded to the SSA in Baltimore, which then notifies the states through the State Data Exchange (SDX).

(70) TDI--Texas Department of Insurance.

(71) Texas Health Steps (THSteps)--The name adopted by the State of Texas for the federally mandated Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program, described at 42 U.S.C. §1905d(r) and 42 CFR §§440.40 and §§441.40 - 441.62.

(72) Value-Added Services--Additional services for coverage beyond those specified in the Request For Proposal. Value-Added Services may be actual health care services, benefits, or positive incentives that the Commission determines will promote healthy lifestyles and improve health outcomes. These may include participating in certain health-related programs or engaging in certain health-conscious behaviors. Best practice approaches to delivering covered services are not considered Value-Added Services. For foster children in a statewide Medicaid managed care program, value added services may include non-health care services and benefits that support the physical, mental and/or developmental well being of the child.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
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CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.114

The Health and Human Services Commission (HHSC) adopts the amendments to §355.114, concerning the Consumer Directed Services Payment Option, in its Reimbursement Rates Chapter, with a change to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4129). The text of the rule will be republished.

The Department of Aging and Disability Services (DADS) implemented the Consumer Directed Services (CDS) model in September 2001, in multiple Medicaid programs, in response to Senate Bill 1586, 76th Legislature, Regular Session, 1999. The CDS model allows consumers or their legal guardians to be employers of record for the service providers. Thus, under CDS, consumers have greater control and responsibility for their own care and are able to self-direct their services. Consumers who choose consumer direction choose a CDS Agency (CDSA) to provide support services such as payroll processing, assistance

with developing a budget, and guidance to the consumer acting as an employer. Services to consumers who choose not to participate in CDS are provided by contracted agencies.

The CDS model is available in the following programs:

Community Based Alternatives (CBA),

Community Living Assistance and Support Services (CLASS),

Deaf-Blind-Multiple Disability Waiver (DBMD),

Primary Home Care (PHC),

Consumer Managed Personal Assistance Services (CMPAS), and

Medically Dependent Children's Program (MDCP).

It will also be available in the Home and Community Based Services (HCS) program and the Texas Home Living (TxHmL) program beginning January 2008.

The current reimbursement methodology for CDS allocates a portion of the hourly rate to the CDSA for each service the consumer is authorized to receive.

During the renewal of the Texas Home Living (TxHmL) waiver, the Centers for Medicare and Medicaid Services (CMS), United States Department of Health and Human Services, directed Texas to revise the reimbursement methodology for CDSAs to change the payment rate structure to reflect the CDSA's level of effort in carrying out its responsibilities. CMS recommended a monthly fee be paid to the CDSAs.

HHSC received one comment regarding the proposed rule during the comment period from Disability Services of the Southwest, a Consumer Directed Services Agency (CDSA).

Comment: The commenter states that subtracting the flat monthly fee from funds available to the CDS consumer will be devastating to those consumers with very few authorized hours. She states these consumers will no longer be able to participate in CDS, as they will not be able to meet the minimum wage requirements. She also states that some of the consumers who would be able to continue to participate in CDS would be required to cut the pay rates their attendants currently receive. In addition to her comments about the consumer impact, the commenter also states the monthly fee will help the CDSAs budget their costs better.

Response: The agency agrees with the comment, and is changing the rule language in §355.114. The adopted rule now reflects that the payment rate to the consumer for CDS is modeled based on the payment rate to the non-CDS agency for providing services to consumers who do not participate in CDS less an adjustment for the non-CDS agency's indirect costs, as opposed to the balance available after the CDSA monthly fee is subtracted from the consumer's monthly budget.

The amendment is adopted under the Human Resources Code, §32.021, which provides HHSC with the authority to adopt rules necessary to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code, §531.033, which authorizes the executive commissioner of HHSC to adopt rules necessary to carry out the commission's duties under Chapter 531; and Government Code, §531.0055, which authorizes the executive commissioner to adopt rules for the operation and provision of health and human services by the health and human services agencies and to adopt or approve rates of payment required by law to be adopted or approved by a health and human services agency.

§355.114. Consumer Directed Services Payment Option.

(a) For all programs providing consumer directed services (CDS) except the Home and Community-based Services (HCS) program:

(1) The monthly payment to the contracted CDS agency is determined by modeling the estimated cost to carry out the responsibilities of the CDS agency.

(2) The rates for CDS that provide the funds available to the consumers participating in CDS are modeled and are based on the payment rates paid to contracted agencies for providing services to consumers who do not participate in CDS, and then removing from those rates amounts needed to fund CDS agencies responsibilities.

(3) The sum of the payments to the contracted CDS agencies for a 12-month period and the funds available to the consumers participating in CDS for the same 12-month period will not exceed, in the aggregate, the amount that would have been paid to agencies for the same 12 month period if the consumers were not participating in CDS.

(b) For the HCS program:

(1) The monthly payment to the contracted CDS agency is determined by modeling the estimated cost of carrying out the responsibilities of the CDS agency.

(2) The rates for CDS that provide the funds available to the consumer participating in CDS are modeled and are based on the direct care costs plus a portion of the operating costs included in the HCS rate.

(3) The monthly payment to the contracted CDS agency for a 12-month period and the funds available to the consumer participating in CDS for that same 12-month period will not exceed the amount that would have been paid to an agency for the same 12 month period if the consumer was not participating in CDS.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. REIMBURSEMENT METHODOLOGY FOR INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION (ICF/MR)

1 TAC §355.456

The Texas Health and Human Services Commission (HHSC) adopts amended §355.456, related to the reimbursement methodology for the Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) program, without changes to

the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4130) and will not be republished.

Background and Purpose

This adopted rule establishes the reimbursement methodology for state-operated and non-state operated facilities in the ICF/MR program. HHSC, under its authority and responsibility to administer and implement rates, is updating the methodology by eliminating the rebasing process and by using audited cost report data. The amended rule as adopted will reflect the method used to determine rates effective September 1, 2007.

The adopted amendment was made in accordance with the appropriations under the 2008-09 General Appropriations Act (Article II, Special Provisions, Section 57(b)(1), H.B. 1, 80th Legislature, Regular Session, 2007).

Comments

The 30-day comment period ended August 6, 2007. During this period, which included a public hearing on July 16, 2007, HHSC received fourteen negative comments regarding the proposed amendment to this rule. The Private Providers Association of Texas (PPAT), nine contracted providers of services, three employee caregivers of a contracted provider, and one family member of a client issued comments on the rule amendment. A summary of the comments and HHSC's responses follows:

Comment: The rule changes reflect an outdated and ineffective method for establishing reimbursement rates by basing rates and funding on historical cost data. This method compromises provider's ability to meet program and staffing requirements and makes them unable to maintain a stable financial base to respond to market needs. The current rule should be implemented and not abandoned.

HHSC Response: The language regarding the rebasing process was deleted because HHSC no longer uses a consultant and advisory panel for rate determination in these programs. The process of rebasing rates using a consultant to collect a sample of cost and operational information and a consultant panel to make recommendations on rates has not been utilized in many years and is not intended to be utilized for determining rates effective September 1, 2007. Effective September 1, 2007, HHSC plans to use a process that updates the current rate models with audited cost report cost data to the extent possible within the appropriations for the 2008 - 2009 biennium. The use of cost report data to establish rates is consistent with rate determination for other long-term care programs. HHSC did not change the proposed rule in response to this comment.

Comment: HHSC should not rush to change the rules and instead should put the increase in rates all in the provider's indirect cost category or spread the increase evenly across all of the service categories.

HHSC Response: The rules provide for the allocation of appropriated funds to the cost categories, levels of care, and services based on the costs as they were incurred by the providers as reflected in their cost reports. To allocate costs either all to the indirect costs or to spread them evenly across all of these factors ignores actual provider spending patterns. Both of these methods will draw funds from direct care staff salaries and shift funds to the indirect operations and overhead parts of the rate, with no consideration to how providers are expending funds on direct care staff. HHSC did not change the proposed rule in response to this comment.

Comment: House Bill (H.B.) 2540 passed and signed by the Governor seeks to improve and streamline the cost reporting process. The current process is burdensome and complicated. The proposed historic-cost based rate system would appear to require more detailed cost report data than mandated under H.B. 2540. These rules should be implemented in accordance with H.B. 2540.

HHSC Response: H.B. 2540 from the 80th Legislature, Regular Session, 2007, instructs HHSC to develop and implement a pilot project that adopts reporting and auditing processes similar to standard business financial reporting processes and guidelines. The bill is effective September 1, 2007, and the pilot project will not have begun at the time the increased rates for this program need to be implemented. HHSC did not change the proposed rule in response to this comment.

Comment: The rules have not been officially adopted, yet are being used to set rates for state fiscal year 2008, which is illegal and does not represent a collaborative process. The process under current law is being violated.

HHSC Response: These adopted rules will be effective September 1, 2007, the same day the rate increases will become effective. A public hearing on the rate increases was held on July 25, 2007. Notice of the public hearing was published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4261). HHSC did not change the proposed rule in response to this comment.

Comment: No changes should be made to the rules because special needs children, adults, and their parents deserve the best caregivers that can be provided. There may be a reduction in rate increases due to the proposed rule changes that would negatively impact our programs. Rates should truly reflect the current costs of providing services.

HHSC Response: These rules ensure that an appropriate amount of the funds appropriated by the legislature for the 2008-09 state biennium will be allocated to the portion of the rates that is for the salaries of the direct care staff providing hands-on care to the Medicaid clients in this program. These rules ensure that all of the funds appropriated for the 2008-09 state biennium will be included in the rate increases that will become effective September 1, 2007. HHSC did not change the proposed rule in response to this comment.

Comment: Providers and many Mental Retardation Authorities have had to sell their ICF/MR homes due to dramatic cost of living increases. The proposed rules would continue to negatively affect people's choices and limit the provider's ability to provide the services that are desperately needed.

HHSC Response: These rules ensure that all of the funds appropriated for the 2008-09 state biennium will be included in the rate increases that will become effective September 1, 2007. HHSC did not change the proposed rule in response to this comment.

Comment: Concerning §355.456(7), the proposed rules would no longer provide for collecting a sample of cost data from providers.

HHSC Response: Currently HHSC collects cost reports from all contracted providers; therefore, the language regarding collecting a sample of cost reports is obsolete. HHSC did not change the proposed rule in response to this comment.

Comment: Concerning §355.456(7), proposed rule changes would base rates on historical costs with no consideration of current economic conditions which can change so quickly to

make the data meaningless. The proposed methodology can only predict greater need when providers have the resources to spend more than 100% of revenue to signal that current rates are insufficient. The current rules were developed to better model the actual environment with the inclusion of both market and industry data.

HHSC Response: The cost reports reflect industry cost experience in caring for Medicaid clients in this program. The costs on the cost report are adjusted for inflation to the rate period and the inflated costs are then used to update the rate models used for funding requests to the legislature and rate determination. The inflation adjustment that is applied to reported costs takes into account general inflation that occurs between the cost reporting period and the rate period, thus adjusting for changes in cost over time. HHSC did not change the proposed rule in response to this comment.

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021 and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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1 TAC §355.458

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §355.458, related to the rebasing of model rates for non-state operated providers in the Intermediate Care Facilities Mental Retardation (ICF/MR) program, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4133) and will not be republished.

Background and Purpose

This repealed rule as adopted establishes the rebasing process that is part of the reimbursement methodology for non-state operated facilities in the ICF/MR program. The rebasing process revises the underlying assumptions on which the modeled rates are calculated. HHSC, under its authority and responsibility to administer and implement rates, is updating the methodology by eliminating the rebasing process and by using audited cost report data. Section 355.456 in this subchapter, which is amended as part of this rule packet, reflects the method used to determine rates effective September 1, 2007.

Comments

The 30-day comment period ended August 6, 2007. During this period, which included a public hearing on July 16, 2007, HHSC received fourteen negative comments regarding the proposed repeal of this rule. The Private Providers Association of Texas (PPAT), nine contracted providers of services, three employee caregivers of a contracted provider, and one family member of a client issued comments on the rule amendment. A summary of the comments and HHSC's responses follows:

Comment: The rule changes reflect an outdated and ineffective method for establishing reimbursement rates by basing rates and funding on historical cost data. This method compromises provider's ability to meet program and staffing requirements and makes them unable to maintain a stable financial base to respond to market needs. The current rule should be implemented and not abandoned.

HHSC Response: The language regarding the rebasing process was deleted because HHSC no longer uses a consultant and advisory panel for rate determination in these programs. The process of rebasing rates using a consultant to collect a sample of cost and operational information and a consultant panel to make recommendations on rates has not been utilized in many years and is not intended to be utilized for determining rates effective September 1, 2007. Effective September 1, 2007, HHSC plans to use a process that updates the current rate models with audited cost report cost data to the extent possible within the appropriations for the 2008 - 2009 biennium. The use of cost report data to establish rates is consistent with rate determination for other long-term care programs. HHSC did not change the proposed rule in response to this comment.

Comment: HHSC should not rush to change the rules and instead should put the increase in rates all in the provider's indirect cost category or spread the increase evenly across all of the service categories.

HHSC Response: The rules provide for the allocation of appropriated funds to the cost categories, levels of care, and services based on the costs as they were incurred by the providers as reflected in their cost reports. To allocate costs either all to the indirect costs or to spread them evenly across all of these factors ignores actual provider spending patterns. Both of these methods will draw funds from direct care staff salaries and shift funds to the indirect operations and overhead parts of the rate, with no consideration to how providers are expending funds on direct care staff. HHSC did not change the proposed rule in response to this comment.

Comment: House Bill (HB) 2540 passed and signed by the Governor seeks to improve and streamline the cost reporting process. The current process is burdensome and complicated. The proposed historic-cost based rate system would appear to require more detailed cost report data than mandated under HB 2540. These rules should be implemented in accordance with HB 2540.

HHSC Response: House Bill 2540 from the 80th Legislature, Regular Session, 2007, instructs HHSC to develop and implement a pilot project that adopts reporting and auditing processes similar to standard business financial reporting processes and guidelines. The bill is effective September 1, 2007, and the pilot project will not have begun at the time the increased rates for this program need to be implemented. HHSC did not change the proposed rule in response to this comment.

Comment: The rules have not been officially adopted, yet are being used to set rates for state fiscal year 2008, which is illegal

and does not represent a collaborative process. The process under current law is being violated.

HHSC Response: These adopted rules will be effective September 1, 2007, the same day the rate increases will become effective. A public hearing on the rate increases was held on July 25, 2007. Notice of the public hearing was published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4261). HHSC did not change the proposed rule in response to this comment.

Comment: Providers and many Mental Retardation Authorities have had to sell their ICF/MR homes due to dramatic cost of living increases. The proposed rules would continue to negatively affect people's choices and limit the provider's ability to provide the services that are desperately needed.

HHSC Response: These rules ensure that all of the funds appropriated for the 2008-09 state biennium will be included in the rate increases that will become effective September 1, 2007. HHSC did not change the proposed rule in response to this comment.

Comment: Concerning §355.458(2), the proposed rules would no longer provide for collecting a sample of cost data from providers.

HHSC Response: Currently HHSC collects cost reports from all contracted providers; therefore, the language regarding collecting a sample of cost reports is obsolete. HHSC did not change the proposed rule in response to this comment.

Comment: No changes should be made to the rules because special needs children, adults, and their parents deserve the best caregivers that can be provided. There may be a reduction in rate increases due to the proposed rule changes that would negatively impact our programs. Rates should truly reflect the current costs of providing services.

HHSC Response: These rules ensure that an appropriate amount of the funds appropriated by the legislature for the 2008-09 state biennium will be allocated to the portion of the rates that is for the salaries of the direct care staff providing hands on care to the Medicaid clients in this program. These rules ensure that all of the funds appropriated for the 2008-09 state biennium will be included in the rate increases that will become effective September 1, 2007. HHSC did not change the proposed rule in response to this comment.

The repeal is adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021 and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón

Chief Counsel

Texas Health and Human Services Commission

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SUBCHAPTER E. COMMUNITY CARE FOR AGED AND DISABLED

1 TAC §355.507

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.507, relating to the Reimbursement Methodology for the Medically Dependent Children Program (MDCP), without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4134) and will not be republished.

The adopted amendment: (1) bases MDCP rates upon Community Based Alternatives, home-and-community-support-services (CBA HCSS) fee-for-service historical costs, unless the current MDCP rates are higher, and deletes rates previously contained in the rule; (2) establishes that rates for independent registered nurses (RN) and licensed vocational nurses (LVN) will be 80 percent of the CBA HCSS rates for these services; (3) bases the MDCP camp rate on the Community Living Assistance and Support Services, direct service agency (CLASS DSA) out-of-home respite rate; and (4) establishes that facility-based respite rates will be based on 77 percent of the nursing facility fee-for-service rates.

HHSC did not receive comments regarding the proposed amendment during the 30-day comment period.

The amendment is adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. REIMBURSEMENT METHODOLOGY FOR PROGRAMS SERVING

PERSONS WITH MENTAL ILLNESS AND MENTAL RETARDATION

1 TAC §355.722

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.722, relating to the reporting of costs and fiscal accountability spending requirements for the Home and Community-based Services (HCS) program, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4135) and will not be republished.

On an annual basis, HCS providers must submit cost reports as directed by HHSC or its designee and in accordance with this subchapter. HHSC, under its authority and responsibility to administer and implement rates, amended this rule to clarify its applicability and to update the cost reporting processes for HCS providers. The amended rule will reflect the method used to collect cost data, which in turn is used to determine rates effective September 1, 2007.

The amendment to this rule was made in accordance with the appropriations under the 2008-2009 General Appropriations Act (Article II, Special Provisions, §57(b)(1), House Bill 1, 80th Legislature, Regular Session, 2007).

HHSC received no comments regarding the proposed amendment during the 30-day comment period, which ended August 6, 2007. The comment period included a public hearing on July 16, 2007.

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021 and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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1 TAC §355.723

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.723, relating to the reimbursement methodology for the Home and Community-Based Services (HCS) program, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4139) and will not be republished.

Background and Purpose

HHSC sets payment rates to be paid to HCS providers annually, and this rule sets out the reimbursement methodology that is used to set those rates. HHSC, under its authority and responsibility to administer and implement rates, is updating the reimbursement methodology by eliminating the rebasing process. The amended rule will reflect the method used to determine rates effective September 1, 2007.

The amendment to this rule was made in accordance with the appropriations under the 2008-2009 General Appropriations Act (Article II, Special Provisions, §57(b)(1), House Bill 1, 80th Legislature, Regular Session, 2007).

Comments

The 30-day comment period ended August 6, 2007. During this period, which included a public hearing on July 16, 2007, HHSC received fourteen negative comments regarding the proposed amendment. The Private Providers Association of Texas (PPAT), nine contracted providers of services three employee caregivers of a contracted provider, and one family member of a client issued comments on the rule amendment. A summary of the comments and HHSC's responses follows:

Comment: The rule changes reflect an outdated and ineffective method for establishing reimbursement rates by basing rates and funding on historical cost data. This method compromises provider's ability to meet program and staffing requirements and makes them unable to maintain a stable financial base to respond to market needs. The current rule should be implemented and not abandoned.

HHSC Response: The language regarding the rebasing process was deleted because HHSC no longer uses a consultant and advisory panel for rate determination in these programs. The process of rebasing rates using a consultant to collect a sample of cost and operational information and a consultant panel to make recommendations on rates has not been utilized in many years and is not intended to be utilized for determining rates effective September 1, 2007. Effective September 1, 2007, HHSC plans to use a process that updates the current rate models with audited cost report cost data to the extent possible within the appropriations for the 2008-2009 biennium. The use of cost report data to establish rates is consistent with rate determination for other long-term care programs. HHSC did not change the proposed rule in response to this comment.

Comment: HHSC should not rush to change the rules and instead should put the increase in rates all in the provider's indirect cost category or spread the increase evenly across all of the service categories.

HHSC Response: The rules provide for the allocation of appropriated funds to the cost categories, levels of care, and services based on the costs as they were incurred by the providers as reflected in their cost reports. To allocate costs either all to the indirect costs or to spread them evenly across all of these factors ignores actual provider spending patterns. Both of these methods will draw funds from direct care staff salaries and shift funds to the indirect operations and overhead parts of the rate, with no consideration to how providers are expending funds on direct care staff. HHSC did not change the proposed rule in response to this comment.

Comment: House Bill (HB) 2540 passed and signed by the Governor seeks to improve and streamline the cost reporting process. The current process is burdensome and complicated. The proposed historic-cost based rate system would appear to

require more detailed cost report data than mandated under HB 2540. These rules should be implemented in accordance with HB 2540.

HHSC Response: House Bill 2540 from the 80th Legislature, Regular Session, 2007, instructs HHSC to develop and implement a pilot project that adopts reporting and auditing processes similar to standard business financial reporting processes and guidelines. The bill is effective September 1, 2007, and the pilot project will not have begun at the time the increased rates for this program need to be implemented. HHSC did not change the proposed rule in response to this comment.

Comment: The rules have not been officially adopted, yet are being used to set rates for state fiscal year 2008 which is illegal and does not represent a collaborative process. The process under current law is being violated.

HHSC Response: These adopted rules will be effective September 1, 2007, the same day the rate increases will become effective. A public hearing on the rate increases will be held on August 14, 2007. Notice of the public hearing was published in the July 27, 2007, issue of the *Texas Register* (32 TexReg 4651). HHSC did not change the proposed rule in response to this comment.

Comment: Concerning §355.723(e), the proposed rules would no longer provide for collecting a sample of cost data from providers.

HHSC Response: Currently HHSC collects cost reports from all contracted providers; therefore, the language regarding collecting a sample of cost reports is obsolete. HHSC did not change the proposed rule in response to this comment.

Comment: Concerning §355.723(e), proposed rule changes would base rates on historical costs with no consideration of current economic conditions which can change so quickly to make the data meaningless. The proposed methodology can only predict greater need when providers have the resources to spend more than 100% of revenue to signal that current rates are insufficient. The current rules were developed to better model the actual environment with the inclusion of both market and industry data.

HHSC Response: The cost reports reflect industry cost experience in caring for Medicaid clients in this program. The costs on the cost report are adjusted for inflation to the rate period and the inflated costs are then used to update the rate models used for funding requests to the legislature and rate determination. The inflation adjustment that is applied to reported costs takes into account general inflation that occurs between the cost reporting period and the rate period, thus adjusting for changes in cost over time. HHSC did not change the proposed rule in response to this comment.

Comment: No changes should be made to the rules because special needs children, adults, and their parents deserve the best caregivers that can be provided. There may be a reduction in rate increases due to the proposed rule changes that would negatively impact our programs. Rates should truly reflect the current costs of providing services.

HHSC Response: These rules ensure that an appropriate amount of the funds appropriated by the legislature for the 2008-2009 state biennium will be allocated to the portion of the rates that is for the salaries of the direct care staff providing hands-on care to the Medicaid clients in this program. These rules ensure that all of the funds appropriated for the 2008-2009 state biennium will be included in the rate increases that will become effective September 1, 2007. HHSC did not change the proposed rule in response to this comment.

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021 and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2007.

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Steve Aragón
Chief Counsel
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For further information, please call: (512) 424-6900

SUBCHAPTER H. REIMBURSEMENT METHODOLOGY FOR 24-HOUR CHILD CARE FACILITIES

1 TAC §355.7103

The Texas Health and Human Services Commission (HHSC or Commission) adopts amendments to §355.7103, concerning Rate-Setting Methodology for 24-Hour Residential Child-Care Reimbursements, in its Reimbursement Rates Chapter, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4141) and will not be republished.

Appropriations for the Department of Family and Protective Services (DFPS) 24-Hour Child-Care Program for the state fiscal years 2008 through 2009 increased by an amount sufficient to support an average rate increase of 4.3 percent above current rates for this program. The Legislature expressed its intent in the 2008-2009 General Appropriations Act (Article II, Department of Family and Protective Services, Rider 33, House Bill 1, 80th Legislature, Regular Session, 2007) that HHSC ensure that, out of funds appropriated for rate increases for foster care, foster families receive a rate increase of 4.3 percent above the current minimum rate paid to foster families for each level of service. Subsequent discussions with DFPS executive staff and stakeholders indicated that it would be appropriate for HHSC to ensure that Child Placing Agencies (CPAs) also receive a rate increase of 4.3 percent above the current rate paid to CPAs for each level of service. It was also recommended that remaining funds be distributed proportionally across all other types of providers of foster care based on each provider type's ratio of costs, as reported on the most recently audited cost report, to existing payment rates.

HHSC therefore adopts new §355.7103(m) to provide that, for foster families, the rates effective September 1, 2007, through August 31, 2009, for each level of service will be equal to the minimum rate paid to foster families for the same level of service

in effect August 31, 2007, plus 4.3 percent. As well, the amendment provides that, for CPAs, the rates effective September 1, 2007, through August 31, 2009, for each level of service will be equal to the rate paid to CPAs for the same level of service in effect August 31, 2007, plus 4.3 percent. Remaining appropriated funds will be distributed proportionally across all other types of providers of foster care based on each provider type's ratio of costs, as reported on the most recently audited cost report, to existing payment rates.

Finally, DFPS is implementing a new program for children in DFPS conservatorship who have extreme behaviors and histories of inpatient psychiatric care to assist them in transitioning to more traditional Child Protective Services residential care settings, and this new program requires payment rates. Therefore, HHSC is adopting new §355.7103(p) to allow payment rates for this program to be determined on a pro forma approach. A pro forma analysis is defined as an item-by-item, or classes-of-items, calculation of the reasonable and necessary expenses for a provider to operate. This rule will allow DFPS to reimburse providers for services under this new program.

No comments were received concerning adoption of the proposed amendments to §355.7103.

The amendments are adopted under Texas Government Code §531.033, which authorizes the executive commissioner of HHSC to adopt rules necessary to carry out the Commission's duties; Texas Government Code §531.055, which authorizes the executive commissioner to adopt rules for the operation and provision of health and human services by the health and human services agencies and to adopt or approve rates of payment required by law to be adopted or approved by a health and human services agency; and the Human Resources Code, §40.004(c) and (d), which authorize the executive commissioner to consider fully all written and oral submissions to the DFPS Council about a proposed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
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SUBCHAPTER J. PURCHASED HEALTH SERVICES
DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8061

The Health and Human Services Commission (HHSC) adopts an amendment to §355.8061, concerning the payment of hospital services, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4142) and will not be republished.

Certain high-volume providers of Medicaid covered services receive enhanced payments. This rule identifies a high-volume outpatient hospital provider as a provider that was paid at least $200,000 during a designated base year. The amendment to §355.8061(a)(2) updates the base year for determining which outpatient hospitals qualify as high-volume providers from calendar year 2000 to calendar year 2004.

HHSC did not receive comments regarding the proposed rule amendment during the 30-day comment period.

The amendment is adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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1 TAC §355.8063

The Health and Human Services Commission (HHSC) adopts amendments to §355.8063, concerning the Reimbursement Methodology for Inpatient Hospital Services, with changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4143). The text of the rule will be republished.

As required by the 2008-09 General Appropriations Act (Article II, Health and Human Services Commission, H.B. 1, 80th Legislature, Regular Session, 2007), the adopted amendments change the Medicaid reimbursement methodology for inpatient hospital services. Specifically, HHSC is amending §355.8063(h), (n)(2) and (q).

Currently, there are provisions in §355.8063(h) and (n)(2) that expire on August 31,2007. HHSC uses standard dollar amounts in the calculation of inpatient hospital reimbursement rates. Based on Medicaid appropriations for fiscal year 2008, the amendment to §355.8063(h) will extend to August 31, 2008, the time period during which HHSC will not rebase or recalculate the standard dollar amounts (SDAs). The exception will be that HHSC will partially rebase state-owned teaching hospitals effective September 1, 2007, ending August 31, 2008, based on fiscal year 2003 cost data inflated to fiscal year 2005 using a cost-of-living index, adjusted proportionately to available funds. Also based on fiscal year 2008 Medicaid appropriations, the amendment to §355.8063(n)(2) will extend to August 31, 2008, the period for which the cost of living index will not be applied to the SDAs.

Section 355.8063(q) is amended as required by the 2008-09 General Appropriations Act (Article II, Health and Human Ser-

vices Commission, Rider 52, H.B. 1, 80th Legislature, Regular Session, 2007). This amendment changes the categories of hospitals that are eligible to receive the greater of Diagnosis Related Group (DRG) or Tax Equity and Fiscal Responsibility Act (TEFRA) reimbursement based on cost settlement.

HHSC received one comment regarding the proposed rule during the 30-day comment period. A summary of the comment and HHSC's response follow.

Comment:

HHSC received a comment from Tenet Healthcare Corporation related to §355.8063(q), requesting the addition of language to clarify that the specific types of inpatient acute care hospital claims that are eligible for cost settlement are fee-for-service (FFS) and Primary Care Case Management (PCCM) program claims. The commenter felt it would alleviate any confusion as to the specific group of claims that would be eligible for cost settlement under this provision of the rule.

HHSC Response:

HHSC acknowledges the comment and has modified the language in subsection (q) to define the specific inpatient Medicaid programs whose claims are eligible for cost settlement under this provision of the rule.

The amendments are adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

§355.8063. Reimbursement Methodology for Inpatient Hospital Services.

(a) Introduction. Except as otherwise specified in subsection (q) of this section, the Texas Medical Assistance Program (Medicaid) reimburses hospitals, except in-state children's hospitals, for covered inpatient hospital services using a prospective payment system. In-state children's hospitals are reimbursed for covered inpatient hospital services using the methodology described in subsection (o) of this section. For hospitals other than in-state children's hospitals, the Health and Human Services Commission (HHSC) or its designee groups hospitals into payment divisions using the average base year payment per case in each hospital after adjusting each hospital's base year payment per case by a case mix index and a cost-of-living index. The payment divisions are separated into $100 increments. If a payment division has less than ten observations for Medicaid data, the HHSC or its designee considers that payment division to be statistically invalid. Hospitals within that payment division are placed into the nearest valid payment division.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Diagnosis-related group (DRG)--The taxonomy of diagnoses as defined in the Medicare DRG system or as otherwise specified by the HHSC or its designee.

(2) Case mix index--The hospital-specific average relative weight.

(3) Relative weight--The arithmetic mean of the dollars for a specific DRG divided by the arithmetic mean of the dollars for all cases.

(4) Standard dollar amount--The weighted mean base year payment for all hospitals in a payment division after adjusting each hospital's base year payment per case by a case mix index, and a cost-of-living index. The HHSC or its designee establishes a minimum standard dollar amount of $1,600 and applies it to those hospitals whose standard dollar amount is less than the minimum. The HHSC or its designee applies cost-of-living indexes to the standard dollar amounts established for the base year to calculate standard dollar amounts for prospective years. A cost-of-living index is not applied to the minimum standard dollar amount.

(5) Base year--A 12-consecutive-month period of claims data selected by the HHSC or its designee as the basis for establishing the payment divisions, standard dollar amounts, and relative weights. The HHSC or its designee selects a new base year at least every three years.

(6) Base year payment per case--The payment that would have been made to a hospital if the HHSC or its designee reimbursed the hospital under similar methods and procedures used in Title XVIII of the Social Security Act, as amended, effective October 1, 1982, by Public Law 97-248. In calculating the base year payment per case, the HHSC or its designee uses the interim rate established at tentative or final settlement, if applicable, of the most recent cost reporting period up to and including the cost reporting period associated with the base year.

(7) Interim rate--Total reimbursable Title XIX inpatient costs, as specified in paragraph (6) of this subsection, divided by total covered Title XIX inpatient charges per tentative or final cost reporting period. The interim rate established at tentative settlement includes incentive/penalty payments to the extent that they continue to be permitted by federal law and regulation and continue to be included on Title XVIII cost reports.

(8) New hospital--A facility that has been in operation under present and previous ownership for less than three years and that initially enrolls as a Title XIX provider after the current base year. A new hospital must have been substantially constructed within the five previous years from the effective date of the prospective rate period.

(9) Children's hospital--A hospital within Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(10) Out-of-state children's hospital--A hospital outside of Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(c) Calculating relative weights and standard dollar amounts. The HHSC or its designee uses recent Texas claims data to calculate both the relative weights and standard dollar amounts. A relative weight is calculated for each DRG and applied to all payment divisions. A separate standard dollar amount is calculated for each payment division. Except for border hospitals with a Texas Medicaid provider number beginning with an H and out-of-state children's hospitals, the HHSC or its designee uses the overall arithmetic mean base year payment per case, including the cost of living update as specified in subsection (n) of this section, as the standard dollar amount to reimburse out-of-state hospitals. The overall arithmetic mean base year payment per case, including the cost of living update as specified in subsection (n) of this section, is also used as the standard dollar amount to reimburse military hospitals providing inpatient emergency services for admissions on or after October 1, 1993. The calculation of the standard dollar amount for out-of-state children's hospitals is described in subsection (r) of this section. Except for new hospitals, the overall arithmetic mean base year payment per case, including the cost of living update as specified in subsection (n) of this section, is also used

as the standard dollar amount to reimburse hospitals that initially enroll as a Title XIX provider after the current base year. The standard dollar amount for new hospitals is the lesser of the overall arithmetic mean base year payment per case plus three percentile points, including the cost of living update as specified in subsection (n) of this section, or the hospital's average Medicaid cost per Medicaid discharge based on the tentative or final settlement, if applicable, of the hospital's first 12-month cost reporting period occurring after the hospital's enrollment as a Title XIX provider. In the event that the new hospital is a replacement facility for a hospital that is currently enrolled as a Title XIX provider, the hospital is reimbursed by using either the standard dollar amount of the existing provider or the standard dollar amount for new hospitals, whichever is greater. The use of the hospital's average Medicaid cost per Medicaid discharge, after adjusting for case-mix intensity, as its standard dollar amount is applied prospectively to the beginning of the next prospective year and is applicable only if the tentative or final settlement is completed and available at least 60 days before the beginning of the prospective year. The hospital's Medicaid costs are determined using similar methods and procedures used in Title XVIII of the Social Security Act, as amended, effective October 1, 1982, by Public Law 97-248. When two or more Title XIX participating providers merge, the HHSC or its designee combines the Medicaid inpatient costs, as described in this subsection, of each of the individual providers to calculate a standard dollar amount, effective at the start of the next prospective period, to be used to reimburse the merged entity. Acquisitions and buyouts do not result in a recalculation of the standard dollar amount of the acquired provider unless acquisitions or buyouts result in the purchased or acquired hospital becoming part of another Medicaid participating provider. When the HHSC or its designee determines that the HHSC or its designee has made an error that, if corrected, would result in the standard dollar amount of the provider for which the error was made changing to a new payment division, either higher or lower, the HHSC or its designee moves the provider into the correct payment division, and the HHSC or its designee reprocesses claims paid using the initial, incorrect standard dollar amount that was in effect for the current state fiscal year by using the existing standard dollar amount of the payment division in which the provider was moved. In the determination of the corrected payment division, the HHSC or its designee uses the relative weights that are currently in effect for the state fiscal year. The correction of this error condition only applies to the current state fiscal year payments. No corrections are made to payment rates for services provided in previous state fiscal years. If a specific DRG has less than ten observations for Medicaid data, the HHSC or its designee uses the corresponding Medicare relative weight, except for DRGs relating to organ transplants. Relative weights for organ transplant DRGs with less than ten observations may be developed using Medicaid-specific data. The relative weights include organ procurement costs for both solid and nonsolid organs. The HHSC or its designee makes no distinction between urban and rural hospitals and there is no federal/national portion within the payment.

(d) Add-on payments. There are no separate add-on payments. The HHSC or its designee:

(1) includes capital costs in the standard dollar amount for each payment division;

(2) includes the cost of indirect medical education in the standard dollar amount for each payment division;

(3) includes the cost of malpractice insurance in the standard dollar amount for each payment division; and

(4) includes return on equity in the standard dollar amount for each payment division.

(e) Calculating the payment amount. The HHSC or its designee reimburses each hospital for covered inpatient hospital services by multiplying the standard dollar amount established for the hospital's payment division by the appropriate relative weight. The patient's DRG classification is primarily based on the patient's principal diagnosis. The resulting amount is the payment amount to the hospital.

(f) Patient transfers. If a patient is transferred, the HHSC or its designee establishes payment amounts as specified in paragraphs (1) - (4) of this subsection. If appropriate, the HHSC or its designee manually reviews transfers for medical necessity and appropriate payment.

(1) If the patient is transferred to a skilled nursing facility or intermediate care facility, the HHSC or its designee pays the transferring hospital the total payment amount of the patient's DRG.

(2) If the patient is transferred to another hospital, the HHSC or its designee pays the receiving hospital the total payment amount of the patient's DRG. The HHSC or its designee pays the transferring hospital a DRG per diem. The DRG per diem is based on the following formula: (DRG relative weight x standard dollar amount)/DRG mean length of stay (LOS) x LOS. The LOS is the lesser of the DRG mean LOS, the claim LOS, or 30 days. The 30-day factor is not used in establishing a DRG per diem amount for a medically necessary stay of a recipient less than age one in a Title XIX participating hospital or a recipient less than age six in a disproportionate share hospital as defined by the HHSC.

(3) If the HHSC or its designee determines that the transferring hospital provided a greater amount of care than the receiving hospital, the HHSC or its designee reverses the payment amounts. The transferring hospital is paid the total payment amount of the patient's DRG and the receiving hospital is paid the DRG per diem.

(4) The HHSC or its designee makes multiple transfer payments by applying the per diem formula to the transferring hospitals and the total DRG payment amount to the discharging hospital.

(g) Split billing. The HHSC or its designee does not allow interim billings by providers. The hospital may bill the HHSC or its designee when the patient exceeds his 30-day inpatient hospital limit or is discharged. The HHSC or its designee bases payment on the diagnosis codes known at billing. The payment is final.

(h) Rebasing the standard dollar amounts. The HHSC or its designee rebases the standard dollar amount for each payment division at least every three years. HHSC will not rebase or recalculate the standard dollar amounts for each payment division for admissions during the period September 1, 2003 through August 31, 2008. HHSC will partially rebase state-owned teaching hospitals effective September 1, 2007 ending August 31, 2008, based on FY 2003 cost data inflated to FY 2005 using a cost-of-living index, adjusted proportionately to available funds. The relative weights are recalibrated whenever the standard dollar amounts are recalculated. The standard dollar amounts are not rebased on an interim basis unless the HHSC or its designee determines that special circumstances warrant rebasing.

(i) Recalibrating the relative weights. The HHSC or its designee recalibrates the relative weights whenever the standard dollar amounts are rebased.

(j) Revising the diagnosis related groups. The HHSC or its designee parallels the taxonomy of diagnoses as defined in the Medicare DRG prospective payment system unless a revision is required based on Texas claims data or other factors as determined by the HHSC or its designee.

(k) Appeals.

(1) A hospital may appeal individual claims as specified in other HHSC rules. As specified in subparagraphs (A) - (C) of this paragraph, a hospital may also appeal mechanical, mathematical, and data entry errors in base year claims data and incorrectly computed subsequent adjustments to the hospital's base year claims data because of the base year's tentative or final settlement.

(A) If a hospital believes that the HHSC or its designee made a mechanical, mathematical, or data entry error in computing the hospital's base year claims data, the hospital may request a review of the disputed calculation by the HHSC or, at the HHSC direction, its designee. A hospital may not request a review if the disputed calculation is the result of the hospital's submittal of incorrect data or the result of the HHSC or its designee's application of an interim rate to the base year claims data derived from a cost reporting period occurring before the base year. Upon the provider hospital's request, the HHSC or its designee provides the applicable available data used in calculating the hospital's base year claims data to the provider hospital. The hospital must submit a specific written request for review and appropriate specific documentation supporting its contention that there has been a mechanical, mathematical, or data entry error to the HHSC or its designee. Except as specified in subparagraph (C) of this paragraph, the request must be submitted within 60 days after the hospital receives initial notification of its payment division and standard dollar amount. The HHSC or its designee conducts the review as quickly as possible and notifies the hospital of the results. If the hospital is dissatisfied with the results of the review, the hospital may request a formal hearing under the procedures, including the expedited processing provisions, except that, in the event of any conflict, the procedures contained in this section apply. Except as specified in subparagraph (C) of this paragraph, if the review or appeal is completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied to that next prospective year. If the review or appeal is not completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied only to the subsequent prospective year. The base year claims data used by the HHSC or its designee pending the review or appeal is the base year claims data established by the HHSC or its designee.

(B) If a hospital believes that the HHSC or its designee incorrectly computed subsequent adjustments to the hospital's base year claims data because of the base year's tentative or final settlement, the hospital may request a review of the disputed calculation related to the tentative or final settlement by the HHSC or, at the HHSC direction, its designee. The hospital's request may also include a request to review the tentative or final settlement. The hospital must submit a specific written request for review and appropriate specific documentation supporting its contention that the tentative or final settlement is incorrect to the HHSC or its designee. Except as specified in subparagraph (C) of this paragraph, the request must be submitted within 60 days after the hospital receives notification of a tentative or final settlement of the base year data. The HHSC or its designee conducts the review as quickly as possible and notifies the hospital of the results. If the hospital is dissatisfied with the results of the review, the hospital may request a formal hearing under the procedures, including the expedited processing provisions, contained in Chapter 1 of this title (relating to the Texas Board of Health), except that, in the event of any conflict, the procedures contained in this section apply. Except as specified in subparagraph (C) of this paragraph, if the review or appeal is completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied to that next prospective year. If the review or appeal is not completed at least 60 days before the beginning of the next prospective year, any adjustment required after the completion of the review or appeal is applied only to the subsequent prospective year. The interim rate applied to the base year claims data pending the review or appeal is the interim rate established by the HHSC or its designee.

(C) If a hospital believes that the HHSC or its designee incorrectly computed the hospital's 1985 base year claims data as specified in subparagraph (A) of this paragraph, the hospital may submit a specific written request for review and appropriate specific documentation supporting its contention within 60 days after the effective date of this section. If a hospital believes that the HHSC or its designee incorrectly computed the tentative or final settlement of the cost reporting period associated with the 1985 base year as specified in subparagraph (B) of this paragraph, the hospital may submit a specific written request for review and appropriate specific documentation supporting its contention within 60 days after the effective date of this section. The hospital must follow the process described in subparagraph (A) or (B) of this paragraph, as appropriate. If the review or appeal is completed by December 31, 1987, any adjustment required after the completion of the review or appeal is applied to the March 1, 1988, adjustment described in subsection (n) of this section. If the review or appeal is not completed by December 31, 1987, any adjustment required after the completion of the review or appeal is applied to the next prospective year.

(2) A hospital may not appeal the prospective payment methodology used by the HHSC or its designee, including:

(A) the payment division methodologies;

(B) the DRGs established;

(C) the methodology for classifying hospital discharges within the DRGs;

(D) the relative weights assigned to the DRGs; and

(E) the amount of payment as being inadequate to cover costs.

(l) Cost reports. Each hospital must submit a cost report at periodic intervals as prescribed by Medicare or as otherwise prescribed by the HHSC or its designee. The HHSC or its designee uses data from these reports in rebasing years, in making adjustments as described in subsections (n) and (q) of this section, and in completing cost settlements for children's hospitals.

(m) Cost settlements. If a hospital has already begun its fiscal year on September 1, 1986, cost settlement for that portion of the hospital's fiscal year which occurs before September 1, 1986, is based on reimbursement for covered inpatient hospital services under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248. Except as otherwise specified in subsection (q) of this section, there are no cost settlements for services provided to recipients admitted as inpatients to hospitals reimbursed under the prospective payment system on or after the implementation date of the prospective payment system.

(n) Adjustments to base year claims data.

(1) Beginning with 1985 hospital fiscal year cost reporting periods, the HHSC or its designee adjusts each hospital's base year claims data and resulting payment division and standard dollar amount to reflect the interim rate established at tentative and final settlement, if applicable, of the cost reporting period associated with the base year. The adjustments are applied only to claims data for months within the base year that coincide with months within the hospital's cost reporting period. The claims data for months within the base year that do not coincide with months within the hospital's cost reporting period remain unchanged until the tentative or final settlement of the cost reporting period containing those months has been completed. The adjustments

are applied to the next prospective year beginning September 1, 1988, except as specified in subparagraphs (A), (B), and (C) of this paragraph.

(A) If the tentative or final settlement is not completed and available at least 60 days before the beginning of the next prospective year, any adjustment required because of the settlement is applied to the subsequent prospective year.

(B) If a review or appeal of a tentative or final settlement is not completed at least 60 days before the beginning of the next prospective year, the interim rate applied to the claims data on which the hospital's payment division and standard dollar amount are established is the interim rate established at tentative or final settlement by the department or its designee. Any adjustment required after the completion of the review or appeal is applied only to the subsequent prospective year.

(C) The HHSC or its designee makes a March 1, 1988, adjustment.

(2) The HHSC or its designee updates the standard dollar amount each year for each payment division by applying a cost-of-living index to the standard dollar amount established for the base year. The cost-of-living index for state fiscal years 2003, 2004, 2005, 2006, 2007 and 2008 will not be applied to the standard dollar amount for admissions during the period September 1, 2003 through August 31, 2008. The index used to update the standard dollar amounts is the greater of:

(A) the Health Care Financing Administration's (HCFA) Market Basket Forecast (PPS Hospital Input Price Index) based on the report issued for the federal fiscal year quarter ending in March of each year, adjusted for the state fiscal year by summing one-third of the annual forecasted rate of the index for the current calendar year and two-thirds of the annual forecasted rate of the index for the next calendar year; or

(B) an amount determined by selecting the lesser of the following two measures:

(i) the change in total charges per case for the latest year available compared to total charges per case for the previous year; or

(ii) the change in the Texas medical consumer price index-urban (that is, the arithmetic mean of the Houston and Dallas/Fort Worth medical consumer price indices for urban consumers) for the latest year available compared to the Texas medical consumer price index-urban for the previous year.

(o) Reimbursement to in-state children's hospitals. The HHSC or its designee reimburses in-state children's hospitals under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248, Tax Equity and Fiscal Responsibility Act (TEFRA) except for the cost of direct graduate medical education (DGME). For cost reporting periods beginning on or after September 1, 2003, children's hospitals with allowable DGME costs as determined under TEFRA principles will receive a pro rata share of their annual TEFRA DGME cost based on appropriations or allocations from appropriations made specifically for this purpose. The amount and frequency of interim payments will also be subject to the availability of appropriations made specifically for this purpose. Interim payments are subject to settlement at both tentative and final audit of a hospital's cost report. The HHSC or its designee establishes target rates and stipulates payments per discharge, incentives, and percentage of payments. The HHSC or its designee uses each hospital's 1987 final audited cost reporting period (fiscal year ending during calendar year 1987) as its target base period. The target base period for hospitals recognized by Medicare as children's hospitals after the implementation of this subsection is the hospital's first full 12-month cost reporting period occurring after its recognition by Medicare. The HHSC or its designee annually increases each hospital's target amount for the target base period by the cost-of-living index described in subsection (n) of this section. The HHSC or its designee selects a new target base period at least every three years. The HHSC or its designee bases interim payments to each hospital upon the interim rate derived from the hospital's most recent tentative or final Medicaid cost report settlement. If a Title XIX participating hospital is subsequently recognized by Medicare as a children's hospital after the implementation of this subsection, the hospital must submit written notification to the HHSC or its designee and include adequate documentation and claims data. Upon receipt of the written notification from the hospital, the HHSC or its designee reserves the right to take 90 days to convert the hospital's reimbursement to the reimbursement methodology described in this subsection.

(p) Day and cost outliers. Effective for inpatient hospital services provided on or after July 1, 1991, the HHSC or its designee pays day or cost outliers for medically necessary inpatient services provided to clients less than age one in all Title XIX participating hospitals and clients less than age six in disproportionate share hospitals, as defined by the HHSC, that are reimbursed under the prospective payment system. For purposes of outlier payment adjustments, disproportionate share hospitals are defined as those hospitals identified by the HHSC during the previous state fiscal year as disproportionate share hospitals. If an admission qualifies for both a day and a cost outlier, only the outlier resulting in the highest payment to the hospital is paid. (Note: This subsection does not address reimbursement for the provision of other necessary inpatient hospital services under the Early and Periodic Screening, Diagnosis, and Treatment Program, as required by the Omnibus Budget and Reconciliation Act of 1989.)

(1) To establish day outliers, the HHSC or its designee first removes from the current base year data those admissions whose actual lengths of stay are greater than or equal to plus or minus three standard deviations from the arithmetic mean length of stay for each DRG. The HHSC or its designee then recomputes the arithmetic mean length of stay and the standard deviations for each DRG. Inpatient days, which exceed two standard deviations beyond the arithmetic mean length of stay for the DRG are eligible for a day outlier. Payment is based on 70% of a per diem amount of a full DRG payment. The per diem amount is established by dividing the full DRG payment amount by the arithmetic mean length of stay for the DRG.

(2) To establish cost outliers, the HHSC or its designee first determines what the amount of reimbursement for the admission would have been if the HHSC or its designee reimbursed the hospital under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248, Tax Equity and Fiscal Responsibility Act (TEFRA). The HHSC or its designee then determines the outlier threshold by using the greater of the full DRG payment amount multiplied by 1.5 or an amount determined by selecting the lesser of the universe mean of the current base year data multiplied by 11.14, or the hospital's standard dollar amount multiplied by 11.14. The hospital's standard dollar amount is the amount that the HHSC or its designee uses to reimburse the hospital under the prospective payment system. The outlier threshold is subtracted from the amount of reimbursement for the admission established under the TEFRA principles. The HHSC or its designee multiplies any remainder by 70% to determine the actual amount of the cost outlier payment.

(3) If a recipient less than age one is admitted to and remains in a hospital past his or her first birthday, medically necessary inpatient days and hospital charges after the child reaches age one are included in calculating the amount of any day or cost outlier payment.

(q) Hospitals in counties with 50,000 or fewer persons and certain other hospitals. Hospitals will be reimbursed the greater of the prospective payment system rate or a cost-reimbursement methodology authorized by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) using the most recent data for Medicaid Fee-for-Service (FFS) and Primary Care Case Management (PCCM) inpatient services if, as of September 1, 2007, the hospital is:

(1) located in a county with 50,000 or fewer persons or;

(2) a Medicare-designated Rural Referral Center (RRC) or Sole Community Hospital (SCH) not located in a metropolitan statistical area (MSA), as defined by the U.S. Office of Management and Budget; or

(3) a Medicare-designated Critical Access Hospital (CAH), shall be reimbursed the greater of the prospective payment system rate or a cost-reimbursement methodology authorized by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) using the most recent data. Hospitals reimbursed under TEFRA cost principles will be paid without the imposition of the TEFRA cap.

(r) Reimbursement to out-of-state children's hospitals. For admissions on or after September 1, 1991, the standard dollar amount for out-of-state children's hospitals is calculated as specified in this subsection. The HHSC or its designee calculates the overall average cost per discharge for in-state children's hospitals based on tentative or final settlement of cost reporting periods ending in calendar year 1990. The overall average cost per discharge is adjusted for intensity of service by dividing it by the average relative weight for all admissions from in-state children's hospitals during state fiscal year 1990 (September 1, 1989 through August 31, 1990). The adjusted cost per discharge is updated each year by applying the cost-of-living index described in subsection (n) of this section. The resulting product is the standard dollar amount to be used for payment of claims as described in subsection (e) of this section. The HHSC or its designee selects a new cost reporting period and admissions period from the in-state children's hospitals at least every three years for the purpose of calculating the standard dollar amount for out-of-state children's hospitals.

(s) Reimbursement of inpatient direct graduate medical education (GME) costs. The Medicaid allowable inpatient direct graduate medical education cost, as specified under similar methods and procedures used in the Social Security Act, Title XVIII, as amended, effective October 1, 1982, by Public Law 97-248, is calculated for each hospital having inpatient direct graduate medical education costs on its tentative or final audited cost report. Those inpatient direct medical education costs are removed from the calculation of the interim rate described in subsection (b)(7) of this section and not used in the calculation of the provider's standard dollar amount described in subsection (c) of this section. Those allowable inpatient direct graduate medical education costs for services delivered to Medicaid eligible patients with inpatient admission dates on or after September 1, 1997, will be subject to the cost determination and settlement provisions as described in this subsection. No Medicaid inpatient direct graduate medical education cost settlement provisions are applied to inpatient hospital admissions prior to September 1, 1997. For cost reporting periods beginning on or after September 1, 2003, providers with Medicaid allowable direct graduate medical education costs as described in this subsection will receive a pro rata share of their annual GME cost based on appropriations or allocations from appropriations made specifically for this purpose. The amount and frequency of interim payments will also be subject to the availability of appropriations made specifically for this purpose. Interim payments are subject to settlement at both tentative and final audit of a provider's cost report.

(t) Non-State Owned Hospital Supplemental Inpatient Payments. Notwithstanding other provisions of this chapter, supplemental payments will be made each state fiscal year in accordance with this subsection to eligible hospitals that serve high volumes of Medicaid and uninsured patients.

(1) Supplemental payments are available under this subsection for inpatient hospital services provided by a publicly-owned hospital or hospital affiliated with a hospital district in Bexar, Dallas, Ector, El Paso, Harris, Lubbock, Nueces, Midland, Potter, Randall, Tarrant, and Travis counties. Supplemental payments will be made for inpatient services on or after July 6, 2001, for Bexar, Dallas, Ector, El Paso, Harris, Lubbock, Nueces, Tarrant, and Travis counties. Supplemental payments will be made for inpatient services on or after February 7, 2004, for Midland County. Supplemental payments will be made for inpatient services on or after May 29, 2004 for Potter and Randall counties.

(2) State funding for supplemental payments authorized under this paragraph will be limited to and obtained through intergovernmental transfers of local or hospital district funds. The supplemental payments described in this paragraph will be made in accordance with the applicable regulations regarding the Medicaid upper limit provisions codified at 42 C.F.R. §447.272.

(3) In each county listed in paragraph (1) of this subsection, the publicly-owned hospital or hospital affiliated with a hospital district that incurs the greatest amount of cost for providing services to Medicaid and uninsured patients, will be eligible to receive supplemental high volume payments. The supplemental payments authorized under this paragraph are subject to the following limits:

(A) In each state fiscal year the amount of any inpatient supplemental payments and outpatient supplemental payments may not exceed the hospital's "hospital specific limit," as determined under §355.8065(f)(2)(E) of this chapter (relating to Reimbursement to Disproportionate Share Hospitals (DSH)) for DSH hospitals; and

(B) The amount of inpatient supplemental payments and fee-for-service Medicaid inpatient payments the hospital receives in a state fiscal year may not exceed Medicaid inpatient billed charges for inpatient services provided by the hospital to fee-for-service Medicaid recipients in accordance with 42 CFR §447.271.

(4) Notwithstanding the provisions of paragraphs (1) - (3) of this subsection, a privately-operated hospital that executes an indigent care affiliation agreement (as defined in this subsection) with a hospital district or state or local governmental entity is eligible to receive supplemental payments under this paragraph. The purpose of the affiliation is to pay for unreimbursed care to the Medicaid population to ensure the continued viability of the communities' Medicaid providers.

(A) Supplemental payments will be made for inpatient services on or after June 11, 2005, for eligible hospitals in Hidalgo, Maverick, Montgomery, Travis, Bexar, and Webb counties. Supplemental payments will be made for inpatient services on or after November 12, 2005, for eligible hospitals in all other counties in the State of Texas.

(B) A hospital that is eligible to receive supplemental payments under this paragraph must provide a copy of the fully executed indigent care affiliation agreement to HHSC prior to payment of any supplemental funds under this paragraph.

(C) An eligible hospital must certify, on a form prescribed by HHSC and prior to payment of any supplemental funds under this paragraph, the following:

(i) No part of any supplemental payment paid to the hospital under this paragraph will be returned or reimbursed to the hospital district or state or local governmental entity;

(ii) No part of any supplemental payment paid to the hospital under this paragraph will be used to pay a contingent fee, consulting fee, or legal fee associated with the hospital's receipt of the supplemental funds; and

(iii) The person signing the certification on behalf of the hospital is legally authorized to bind the hospital and to certify the matters described in the certification.

(D) A hospital district or state or local governmental entity must certify, on a form prescribed by HHSC and prior to payment of any supplemental funds under this paragraph, the following:

(i) The hospital district or state or local governmental entity has not received and has no agreement to receive, any portion of the funds paid to an eligible hospital that has executed an affiliation agreement with the hospital district or state or local governmental entity;

(ii) The hospital district or state or local governmental entity has not entered into a contingent fee arrangement related to the hospital district's or state or local governmental entity's participation in the supplemental payment program authorized under this paragraph;

(iii) The hospital district or state or local governmental entity is authorized to participate in the supplemental payment program authorized under this paragraph pursuant to a vote of the hospital district's or state or local governmental entity's governing body in a public meeting preceded by public notice published in accordance with the hospital district's or state or local governmental entity's usual and customary practices or the Texas Open Meetings Act, as applicable;

(iv) All affiliation agreements, consulting agreements, or legal services agreements executed by the hospital district or state or local governmental entity related to the hospital district's or state or local governmental entity's participation in the supplemental payment program authorized under this paragraph are available for public inspection upon request.

(E) Beginning August 31, 2008, each participating hospital and hospital district or state or local governmental entity must submit a fully executed indigent care affiliation agreement as well as certification forms on or before August 31st of each fiscal year to be eligible to receive supplemental payments under this paragraph during the following fiscal year.

(F) If the federal Centers for Medicare and Medicaid Services (CMS), the United States Department of Health and Human Services, or other responsible legal authority recoups federal financial participation related to an eligible hospital's receipt and/or use of supplemental payments authorized under this paragraph, HHSC may recoup an amount equivalent to the amount of supplemental payments recouped by CMS. Supplemental payments under this paragraph may be subject to any adjustments for payments made in error, including, without limitation, adjustments under §371.1703 of this title (relating to recovery of overpayments), 42 C.F.R. part 455, and chapter 403, Texas Government Code. HHSC will send a notice of recoupment to the hospital and will recoup from any current or future Medicaid payments as follows:

(i) HHSC will recoup from the hospital against which the disallowance was directed;

(ii) If, within 30 days of the hospital's receipt of HHSC's written notice of recoupment, the hospital has not paid the full amount of the recoupment or entered into an agreement, in writing, with HHSC, HHSC may withhold any or all Medicaid payments from the hospital until such time as HHSC has recovered an amount equal to the hospital's disallowance. If HHSC determines that recovery through a withhold is not feasible, HHSC may recover the amount of the CMS recoupment from the other affiliated hospitals that are a party to the same indigent care affiliation under this paragraph through a withhold of any or all Medicaid payments until such time as HHSC has recovered an amount equal to the hospital's disallowance unless the recoupment is prohibited by law.

(G) Funding of supplemental payments under this paragraph shall be disbursed as follows:

(i) Supplemental payments available under this paragraph shall be payable to a hospital affiliated with a hospital district or state or local governmental entity in proportion to the amount transferred by the hospital district or state or local governmental entity affiliated with the private hospital, subject to legislative appropriation. Such supplemental payments will be based on calculations made by HHSC and will be made quarterly, beginning April 1, 2007.

(ii) If a hospital district or state or local governmental entity does not transfer to HHSC sufficient funding for the time period specified to generate the full amount allowable under this paragraph, each hospital affiliated with that hospital district or state or local governmental entity will receive a portion of the supplemental payment under paragraph (5) of this subsection based on that hospital's percentage of the full entitlement for all hospitals affiliated with that hospital district or state or local governmental entity.

(iii) HHSC will issue one supplemental payment for a hospital for inpatient services the hospital provided on or before August 31, 2006, if the hospital meets the criteria of subparagraphs (A) - (C) of this paragraph no later than May 31, 2007, and if a sufficient amount of funds (as determined by HHSC) are transferred to HHSC to support the one-time supplemental payment no later than December 1, 2007. A hospital district or state or local governmental entity must notify HHSC in a manner prescribed by HHSC of the date it intends to transfer funds related to the supplement payment authorized under this subparagraph. The supplemental payment will be processed for each participating hospital based on the amount of funds transferred to HHSC up to the calculated maximum payment for the applicable retroactive time period. A hospital that satisfies the criteria of subparagraphs (A) - (C) of this paragraph after May 31, 2007, will not be eligible for the supplemental payment authorized under this subparagraph but will be eligible to receive regular supplemental payments under paragraph (5) of this subsection. If the full amount of the calculated intergovernmental transfer (IGT) transfer is not made by the transfer deadlines specified by HHSC, the supplemental payment for that time period will be calculated based on the amount of the funds transferred. Regular quarterly supplemental payments for state fiscal year 2007 for which IGT funds are received will be made, beginning in April 2007, to each participating hospital for which a copy of the fully executed indigent care affiliation agreement, as well as any required certification forms, have been timely received.

(iv) Annual retroactive supplemental payments will be processed once for each state fiscal year, beginning with state fiscal year 2007, in September of the following calendar year (September 2008 for state fiscal year 2007) provided HHSC determines there is sufficient room available for funding under the applicable aggregate upper payment limit for private hospitals. Hospital districts or state or local governmental entities must notify HHSC Rate Analysis in a manner prescribed by HHSC if they intend to transfer funds related to the annual retroactive payments. If HHSC determines that the retroactive funding claimed pursuant to this clause will exceed the applicable ag-

gregate upper payment limit for private hospitals, HHSC will reduce the amount of the transfer for the retroactive payment under this clause proportionately for each participating private hospital in an amount sufficient to ensure compliance with the applicable aggregate upper payment limit. If the retroactive supplemental payment calculation results in the verification that a specific hospital or hospitals were overpaid for the retroactive time period, HHSC will initiate the same process as outlined in subparagraph (F)(i) - (ii) of this paragraph to recover the amount of the overpayment.

(H) State funding for supplemental payments authorized under this paragraph will be limited to and obtained through intergovernmental transfers of local governmental entity or hospital district funds or transfer of State General Revenue. The supplemental payments described in this subsection will be made in accordance with the applicable regulations regarding the Medicaid upper limit provisions codified at 42 C.F.R. §447.272.

(5) An eligible hospital under this subsection will receive quarterly supplemental payments. The quarterly payments will be limited to one-fourth of the lesser of:

(A) The difference between the hospital's Medicaid inpatient billed charges and Medicaid payments the hospital receives for services provided to fee-for-service Medicaid recipients. Medicaid billed charges and payments will be based on a twelve consecutive-month period of fee-for-service claims data selected by HHSC; or

(B) The difference between the hospital's "hospital specific limit," as determined under §355.8065(f)(2)(E) of this chapter relating to Reimbursement to Disproportionate Share Hospitals (DSH)) for DSH hospitals and the hospital's DSH payments as determined by the most recently finalized DSH reporting period.

(6) For purposes of calculating the "hospital specific limit" in paragraph (5)(B) of this subsection, the "cost of services to uninsured patients, " as defined by §355.8065(b)(5) of this chapter and "Medicaid shortfall," as defined by §355.8065(b)(16) of this chapter, will be adjusted as follows:

(A) The amount of Medicaid payments (including inpatient and outpatient supplemental payments) that exceed Medicaid cost will be subtracted from the "Medicaid shortfall."

(B) The amount of the "Medicaid shortfall," as adjusted in accordance with subparagraph (A) of this paragraph, will be subtracted from the "cost of services to uninsured patients" to ensure that, during any state fiscal year, a hospital does not receive more in total Medicaid payments (inpatient and outpatient rate payments, graduate medical education payments, supplemental payments and disproportionate share hospital payments) than its cost of serving Medicaid patients and patients with no health insurance.

(u) High-volume payments recognize the higher medical assistance costs and indigent care cost of hospitals that treat higher levels of low-income and indigent patients. Eligible hospitals are defined as non-state owned or operated, non-public, hospitals located in urban counties with Medicaid days greater than 160% of the mean Medicaid days. High-volume payments not exceeding $26,400,000 shall be allocated in proportion to uncompensated care loss for eligible hospitals participating in the current year DSH program. Payments under this provision will be made annually based on current year finalized Medicaid DSH claims data. The state shall adjust the high volume payments in accordance with applicable Medicaid charge upper limit regulations. Any adjustment shall be made on a proportional basis in order to allow eligible hospitals to participate to the fullest extent possible within the limits on disproportionate share hospital payments. HHSC shall use current year DSH data to determine Medicaid days. County population will be based on the 2000 United States census.

(v) State Owned Hospital Supplemental Inpatient Payments. Notwithstanding other provisions of this attachment, supplemental payments will be made each state fiscal year in accordance with this subsection to state government-owned or operated hospitals for inpatient services provided to Medicaid patients.

(1) Supplemental payments are available under this subsection for inpatient hospital services provided by state government-owned or operated hospitals on or after December 13, 2003. To qualify for a supplemental payment, the hospital must be owned or operated by the state of Texas.

(2) The aggregate supplemental payment amount will be the annual difference between the aggregate upper payment limit and the inpatient fee-for-service Medicaid payments made to the state government-owned or operated hospitals under this attachment. The aggregate upper payment limit will be calculated, based on Medicare payment principles and in accordance with the federal upper limit regulations at 42 CFR §447.272, using the most recent cost report data available.

(3) The amount of the supplemental payment made to each state government-owned or operated hospital will be determined by:

(A) dividing each hospital's fee-for-service Medicaid payments by the sum of the Medicaid fee-for-service payments of all state government-owned of operated hospitals;

(B) multiplying the percentage calculated in subparagraph (A) of this paragraph by the aggregate supplemental payment calculated in paragraph (2) of this subsection.

(4) Supplemental payments determined under this subsection will be calculated annually and paid quarterly.

(5) Supplemental payments made under this subsection when combined with other inpatient payments made under this section shall not exceed the maximum amounts allowable under applicable federal regulations at 42 CFR §447.271.

(w) Reimbursement to freestanding psychiatric facilities. Effective November 1, 2006, HHSC or its designee reimburses freestanding psychiatric facilities, under the prospective payment system, a hospital-specific per diem rate. The per diem rate will be determined based upon the facility's most recent tentative or final Medicaid cost report. HHSC or its designee will not cost settle for services provided to recipients admitted as inpatients to freestanding psychiatric facilities reimbursed under the prospective payment system on or after the implementation date of the prospective payment system.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
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1 TAC §355.8065

The Texas Health and Human Services Commission (HHSC or Commission) adopts amendments to §355.8065, concerning Additional Reimbursement to Disproportionate Share Hospitals, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4145) and will not be republished.

Acute care hospitals participating in the Texas Medicaid Program that meet the conditions of participation and that serve a disproportionate share of low-income patients are eligible for additional reimbursement from the disproportionate share hospital fund. HHSC, as the Medicaid single state agency, establishes each hospital's eligibility for reimbursement and the amount of reimbursement as specified in this rule. (State teaching hospitals have a separate disproportionate share reimbursement rule at §355.8067.)

The damage caused by Hurricanes Katrina and Rita in 2005 demonstrated the need for HHSC to be able to address a situation where a hospital is located in a county declared to be a federal natural disaster area, and due to the disaster, the hospital may have its qualification disrupted. The Legislature expressed its intent in the 2008-09 General Appropriations Act (Article II, Health and Human Services Commission, Rider 65, H.B. 1, 80th Legislature, Regular Session, 2007) that HHSC consider and compensate for the negative impact on DSH funding to hospitals located in counties whose population has changed as a result of a federally declared natural disaster. HHSC therefore adopts new §355.8065(j) to address the process for qualification and payment of disproportionate share hospital funds to a hospital located in a county that is a federally declared natural disaster area. Under this amendment, acute care hospitals that are impacted as a result of a federally declared natural disaster will have the opportunity to request that their disproportionate share funding not be impacted in an adverse manner.

In addition, HHSC needs to amend this rule to update the conversion factors that expire August 31, 2007, and to update cost report citations, and therefore adopts the amendments to §355.8065(f)(2)(D) and §355.8065(f)(2)(E)(ii). These changes will ensure equitable funding to DSH safety net hospitals for State Fiscal Years 2008 and 2009 and will ensure the State obtains accurate data.

HHSC did not receive any comments regarding the proposed rules during the 30-day comment period.

The amendments are adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the Commission's duties; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance (Medicaid) payments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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1 TAC §355.8067

The Texas Health and Human Services Commission (HHSC or Commission) adopts amendments to §355.8067, concerning the Disproportionate Share Hospital Reimbursement Methodology, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4148) and will not be republished.

State teaching hospitals participating in the Texas Medicaid Program that meet the conditions of participation and that serve a disproportionate share of low-income patients are eligible for additional reimbursement from the disproportionate share hospital (DSH) fund. HHSC, as the Medicaid single state agency, establishes each hospital's eligibility for reimbursement and the amount of reimbursement as specified in this rule.

The damage caused by Hurricanes Katrina and Rita in 2005 demonstrated the need for HHSC to be able to address a situation where a hospital is located in a county declared to be a federal natural disaster area, and due to the disaster, the hospital may have its qualification disrupted. The Legislature expressed its intent in the 2008-09 General Appropriations Act (Article II, Health and Human Services Commission, Rider 65, H.B. 1, 80th Legislature, Regular Session, 2007) that HHSC consider and compensate for the negative impact on DSH funding to hospitals located in counties whose population has changed as a result of a federally declared natural disaster. HHSC therefore adopts new §355.8067(h) to address the process for qualification and payment of disproportionate share hospital funds to a hospital located in a county that is a federally declared natural disaster area. Under this amendment, state teaching hospitals that are impacted as a result of a federally declared natural disaster will have the opportunity to request that their disproportionate share funding not be impacted in an adverse manner.

In addition, HHSC needs to amend this rule to update cost report citations, and therefore, adopts an amendment to §355.8067(f)(1)(A). This amendment updates a reference in the rule to a worksheet page in the Centers for Medicare and Medicaid Services (CMS) Hospital and Hospital Health Care Complex Cost Report. This change will ensure the State obtains accurate data.

HHSC did not receive any comments regarding the proposed rule during the 30-day comment period.

The amendments are adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the Commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance (Medicaid) payments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 23. EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT (EPSDT) MEDICAL PHASE

1 TAC §355.8441

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.8441, concerning Reimbursement Methodologies for Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Services, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4150) and will not be republished.

The 2008-2009 General Appropriations Act (Article II, Special Provisions Relating to All Health and Human Services Agencies, Section 57(b)(3)(ii)(d), H.B. 1, 80th Legislature, Regular Session, 2007) increases Medicaid rates for therapy services delivered by home health agencies to Medicaid clients under the age of 21 to be more consistent with Medicaid fees paid to physicians and independently enrolled therapists for similar services. As a result, HHSC proposes to change the Medicaid reimbursement methodologies for therapy services delivered to Medicaid clients under 21 by home health agencies. Section 355.8441, paragraphs (5), (6), and (7), are being revised to reimburse home health agencies the lesser of their billed charges for a specific physical, occupational, or speech therapy service or the fee established by HHSC.

Alberto N. v. Hawkins was filed in 1999, in the U.S. District Court for the Eastern District of Texas. Plaintiffs were children who alleged they had been denied access to certain medically necessary in-home Medicaid services, including personal care services (PCS). To meet plaintiffs' needs and the needs of those similarly situated, HHSC is establishing a personal care services benefit designed especially for THSteps beneficiaries. The proposed new PCS benefit will be operational by September 1, 2007. Prior to this date, personal care services for THSteps-eligible beneficiaries have been and will continue to be available through the Primary Home Care program operated by the Department of Aging and Disability Services.

New §355.8441(12)(a) provides that the reimbursement methodology for personal care services delivered by school districts is located at §355.8443, relating to the Reimbursement Methodology for School Health and Related Services (SHARS). New §355.8441(12)(b) describes the reimbursement methodology for personal care services delivered by providers other than school districts as fees determined by HHSC or its designees using at least one of the following methods: a review of rates paid to providers delivering similar services, modeling using an analysis of other data available to HHSC such as relevant fee surveys, or a combination of the two. Personal care services delivered under the Consumer Directed Services (CDS) payment option will be reimbursed in accordance with §355.114, relating to the Consumer Directed Services Payment Option.

HHSC did not receive comments regarding the proposed rule during the 30-day comment period.

The amendments are adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021 and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 28. PHARMACY SERVICES: REIMBURSEMENT

1 TAC §355.8551

The Texas Health and Human Services Commission (HHSC or Commission) adopts amendments to §355.8551 relating to Dispensing Fee in the Medicaid Vendor Drug Program, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4152) and will not be republished.

The HHSC Vendor Drug Program (VDP) contracts with pharmacies to dispense prescription medications to Medicaid recipients. The 2008-2009 General Appropriations Act (House Bill 1, 80th Legislature, Regular Session, 2007) includes about $56.5 million general revenue for the biennium to increase the pharmacy dispensing expense for VDP prescriptions to Medicaid recipients.

The reimbursement methodology rule for the pharmacy dispensing fee provides for a dispensing expense of $5.27 per prescription that was reduced to $5.14 in late 2003 based on appropriations (a 2.5 percent decrease). The 80th Legislature has funded the rate restoration and provided additional funds to increase the dispensing expense to $7.50.

Additional changes to the rule include updating the inflation pricing index to Personal Consumption Expenditures (PCE) to reflect current practice and changing the time frame for inflation increases from "annually" to "on the first day of the biennium" (every two years). All changes are being made within available funds.

HHSC did not receive comments regarding the proposed rule during the 30-day comment period.

The amendments are adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021, and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance (Medicaid) payments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2007.

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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DIVISION 31. AMBULANCE SERVICES

1 TAC §355.8600

The Texas Health and Human Services Commission (HHSC) adopts amended §355.8600 concerning Ambulance Services without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4153) and will not be republished.

The amended rule changes the reimbursement methodology for ambulance services from one based on a reasonable charge methodology for ground ambulance services to one based on statewide flat fees for all ambulance services.

The 2008 - 2009 General Appropriations Act (Article II, Special Provisions Relating to All Health and Human Services Agencies, Section 57, House Bill 1, 80th Legislature, Regular Session, 2007) includes about $31.3 million general revenue for the biennium to increase Medicaid rates for ambulance services. These additional funds will enable Medicaid reimbursement for ambulance services to move toward the Medicare ambulance fee schedule.

The current reimbursement methodology rule for ambulance services at 1 TAC §355.8600 is based on a reasonable charge methodology for ground ambulance providers. The current reimbursement methodology rule does not include air ambulance providers.

Medicare has been phasing in a national fee schedule for ground and air ambulance services since April 1, 2002. Effective calendar year 2006, Medicare payments for ambulance services are based entirely on the Medicare ambulance fee schedule.

Section 355.8600 is revised to specify that both ground and air ambulance services are reimbursed based on the lesser of the provider's billed charges or fees established by HHSC. The proposed rule further specifies that the fees established by HHSC are based on a review of the Medicare fee schedule and/or an analysis of other data available to HHSC, such as relevant fee surveys, with any adjustments made within available funding.

HHSC did not receive comments regarding the proposed rule during the 30-day comment period.

The amendment is adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 357. HEARINGS

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §357.305, concerning Administrative Review of Fair Hearing Decisions, and adopts new §§357.701 - 357.703, concerning Judicial and Administrative Review of Hearings, without change to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4155) and will not be republished.

Background and Purpose

The Health and Human Services Commission (HHSC) is required to have procedural rules that direct the conduct of administrative hearings. H.B. 75, 80th Legislature, Regular Session, 2007, amended Texas Government Code Chapter 531 to require state court judicial review of HHSC decisions relating to benefit programs under Texas Human Resources Code Chapters 32 (Medicaid) and 33 (Nutritional Assistance Programs). H.B. 75 also requires HHSC to amend the current administrative review process to require an applicant for or recipient of benefits under these programs to request an administrative review of the decision by an agency attorney as a prerequisite for judicial review.

The adopted amendment to §357.305 limits the former administrative review process to public assistance programs under Chapter 31, Human Resources Code, and it describes the process and timeframes for requesting a review of agency fair hearing decisions by an agency attorney.

The proposed new §§357.701 - 357.703 implement the new statutory requirements to have administrative and judicial review of HHSC decisions relating to benefit programs under Chapters 32 and 33, Texas Human Resources Code. New §357.701 establishes the purpose and applicability of the proposed sub-

chapter. New §357.702 defines the terms used in the new subchapter. New §357.703 sets out the process and timeframes for requesting and obtaining administrative review and judicial review of the applicable hearing decisions.

Comments

The 30-day comment period ended August 6, 2007. A summary of the comments and HHSC's response follows.

COMMENT: The Texas Legal Services Center (TLSC) requested that proposed 1 TAC §357.703(b) be amended to insert a new (1) to include the following: "The agency will provide to each appellant, with the hearing officer's and administrative attorney's decision, the following information:

(a) a statement of the appellant's right to request either administrative or judicial review, whichever is applicable;

(b) the contact information for the regional legal services group(s) that can assist with the administrative or judicial review;

(c) that the appellant has 30 days in which to request administrative or judicial review;

(d) the exact date by which the applicable appeal request must be postmarked; and

(e) the identifying information for the administrative review office or Travis County Court, whichever is applicable."

HHSC RESPONSE: In all but one instance the requested information and notices will be provided by September 1, 2007, as set forth below. However, the Commission will not at this time include these items in the rules. Much of it is of a procedural nature that need not be included in rules. Moreover, some of these items will be monitored as judicial review is implemented to ensure that the cost in time in money is not disproportionate to the benefit. When the Commission revises the fair hearing rule base this issue will be reconsidered.

(a) The statement of the appellant's right to request administrative review of the hearing officer's decision will be furnished to the appellant in the Rights and Responsibilities Form that is sent to the appellant with the hearing officer's letter that informs the appellant of the date, time and place of the hearing. This will be provided for those who request either a fair or fraud hearing.

When the hearing officer issues the decision in the case, the cover letter sent to the appellant with the decision will contain information about how to request an administrative review of the hearing officer's decision.

When an attorney issues a final decision in the case following the administrative review, the cover letter sent to the appellant will provide information about how to request judicial review of the agency's decision.

(b) Contact information about the nearest regional legal services group(s) that can assist with the administrative and/or judicial review is provided in the Rights and Responsibilities Form, in the hearing officer's cover letter with the hearing officer's decision, and in the attorney's cover letter with the administrative review decision, as appropriate.

(c) Information that the appellant has 30 days to request an administrative review is provided in the Rights and Responsibilities Form and in the cover letter sent with the hearing officer's decision. Information that the appellant has 30 days to request judicial review is provided in the attorney's cover letter that is sent to the appellant with the attorney's final decision.

(d) The hearing officer's cover letter sent with the decision will contain information that an administrative review request must be received within 30 days of the date of the letter. The attorney's cover letter that transmits the final decision in the case to the appellant will contain information that judicial review must be sought within 30 days of the date of the letter. The large workload of the hearing staff does not allow time for calculating the exact date.

(e) Identifying information about where to send the request for administrative review will be included in the Rights and Responsibilities Form and in the cover letter sent with the hearing officer's decision. Identifying information about where to request judicial review will be included in the cover letter the attorney sends to the appellant with the decision on administrative review.

COMMENT: TLSC also requested that the attorney's decision on the administrative review be sent to the appellant and to the appellant's representative, where applicable, by Certified Mail-Return Receipt Requested. In the alternative, the attorney's decision on the administrative review should be sent to both the appellant and his representative by First Class Mail.

HHSC RESPONSE: The attorney's decision on the administrative review will be sent to the appellant and his representative, if known, by both Certified Mail- Return Receipt Requested and by regular First Class Mail.

COMMENT: TLSC requested that all other provisions of 1 TAC 357 be reviewed for cross-referencing or continuity issues with these new rules.

HHSC RESPONSE: The Appeals Division of HHSC is working to revise all current rules related to the fair and fraud hearing processes. When these revisions are complete, the Appeals Division will determine where cross-referencing is needed for clarity and comprehension.

SUBCHAPTER D. FAIR HEARINGS

1 TAC §357.305

Statutory Authority

The amendment is adopted under Texas Government Code §531.033, which authorizes the executive commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.0055(e), which provides authority for the commissioner to adopt rules and policies for the operation and provision of health and human services by the health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER R. JUDICIAL AND ADMINISTRATIVE REVIEW OF HEARINGS

1 TAC §§357.701 - 357.703

Statutory Authority

The new rules are adopted under Texas Government Code §531.033, which authorizes the executive commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.0055(e), which provides authority for the commissioner to adopt rules and policies for the operation and provision of health and human services by the health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 363. TEXAS HEALTH STEPS COMPREHENSIVE CARE PROGRAM

SUBCHAPTER F. PERSONAL CARE SERVICES

1 TAC §§363.601, 363.603, 363.605, 363.607

The Texas Health and Human Services Commission (HHSC) adopts new §§363.601, 363.603, 363.605, and 363.607, concerning Personal Care Services, with changes to the proposed text as published in the April 27, 2007, issue of the *Texas Register* (32 TexReg 2341). The text of the rules will be republished.

Background and Purpose

Alberto N. v. Hawkins was filed in 1999 in the U.S. District Court for the Eastern District of Texas. Plaintiffs were children who alleged they had been denied access to certain medically necessary in-home Medicaid services, including personal care services (PCS). As a result of the lawsuit, HHSC is implementing an expanded personal care services benefit for Medicaid beneficiaries under the age of 21 who are eligible for the Texas Health Steps program.

The proposed rules are necessary to implement the expanded personal care services benefit for Texas Health Steps beneficiaries. Currently, the Texas Department of Aging and Disability Services (DADS) provides personal care services through the Primary Home Care program to adult beneficiaries and to beneficiaries under the age of 21. Under the proposed new rules, the expanded personal care services benefit will be administered by HHSC for beneficiaries under 21 who have a physical, cognitive, or behavioral limitation related to a disability or chronic health condition that inhibits or impairs the beneficiary's ability to accomplish activities of daily living, instrumental activities of daily living, or health-related functions, regardless of diagnosis. Personal care services for Texas Health Steps beneficiaries will transfer from DADS to HHSC on September 1, 2007. A new Subchapter F, Personal Care Services, is being added to Chapter 363 to enable HHSC to provide the PCS benefit through the Texas Health Steps Comprehensive Care Program.

New §363.601 states the purpose of new Subchapter F and establishes eligibility and medical necessity criteria for PCS. New §363.603 establishes PCS provider participation requirements. New §363.605 describes PCS benefits and limitations, including the authorization process and reasons for termination of services. Section 363.607 lists the locations where a Medicaid client may receive the new PCS benefit.

Comments

HHSC received comments regarding proposed §363.603 and §363.605 during the 30-day comment period, which included a public hearing on May 23, 2007. In addition, under the recommendation of the Medicaid Medical Care Advisory Committee (MCAC) and the HHSC Council, Medicaid/CHIP program staff met with individuals who had presented testimony in opposition to the proposed rules, as well as the Alberto N. Settlement Workgroup, in an effort to reconcile the main areas of disagreement. Medicaid/CHIP staff met with these groups on April 5, 2007, and collected suggested changes regarding the proposed rules. HHSC staff reviewed and carefully considered these comments regarding §§363.603, 363.605 and 363.607.

HHSC also acknowledges receipt of multiple comments from the Alberto N. Settlement Workgroup (Workgroup), MCAC, and HHSC Council testifiers, and the Texas Association of Home Care (TAHC) that were in opposition to HHSC's planned implementation of the personal care services benefit for Texas Health Steps eligibles. However, as the comments were general in nature and not specific to any proposed rule, they did not provide a basis for modifying the proposed rules.

A summary of the comments on the various sections of the proposed rules and HHSC's responses follows. HHSC is making changes to some of the proposed rules in response to the comments. In addition, HHSC is making technical, non-substantive changes to the following: §§363.601(a), 363.603(a)(2), 363.603(a)(3), 363.603(c), 363.603(c)(1)-(3), 363.603(d), 363.603(e), and 363.605(g). In §363.601 HHSC added an explanation that in Texas, the Early and Periodic Screening, Diagnosis and Treatment program is known as Texas Health Steps. In §363.603(a)(2) and (3), HHSC corrected the style of the citation to Chapter 41 of Title 40 of the Texas Administrative Code.

Comment: HHSC received a comment from TAHC concerning the need to specify that the type of provider organizations listed in §363.603(a)(2) are home and community support services agencies licensed by DADS under Title 1, Part 1, Chapter 97, of the Texas Administrative Code (TAC).

HHSC Response: HHSC acknowledges the comment and agrees to identify the relevant Texas Administrative Code citation for the DADS licensure requirements.

Comment: HHSC received comments from the Workgroup concerning proposed restrictions in §363.603(a)(4) on who can serve as personal care services attendant. The Workgroup asked that HHSC add "guardian" and "who is a minor child" to clarify that parent and guardians of a minor child are not eligible to provide personal care services to the child.

HHSC Response: HHSC acknowledges the comment and agrees to insert the suggested language.

Comment: HHSC received a comment from TAHC regarding the establishment of PCS reimbursement rates in §363.603(b). TAHC stated that §363.603(b) should be deleted as rate methodology is addressed in separate rate methodology rules.

HHSC Response: HHSC appreciates the comment, but cannot make the recommended change. Reimbursement rates are to be fully developed in rate methodology rules, but justification for the rates must exist in program rules. HHSC reserves the right to establish multiple PCS reimbursement rates if the care required by beneficiaries will require attendants to have different qualifications or perform different tasks.

Comment: HHSC received a comment from TAHC related to the participation of Consumer Directed Services Agencies (CDSAs), as referenced in 363.603(d). TAHC was concerned that these entities do not provide PCS. The commenter asked whether the Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, will permit HHSC will to enroll CDSAs as a provider of personal care services.

HHSC Response: HHSC appreciates the comment and TAHC's concern but believes that the language concerning CDSA participation in the provision of the PCS benefit is accurate. HHSC will enroll CDSAs as a new Medicaid provider type that will offer only fiscal management and other employer support services, not actual personal care services to PCS beneficiaries.

Comment: HHSC received comments from TAHC that PCS provided by the School Health and Related Services (SHARS) program should not be associated with the new PCS benefit, and that provisions dealing with SHARS in §363.603(f) and §363.605(c)(1) should be deleted.

HHSC Response: HHSC agrees with TAHC's comments and will delete all references to SHARS provisions from the proposed rules, including the two sections referenced above and §363.605(c)(2). HHSC also will add §363.601(d) to clarify that this subchapter does not apply to personal care services delivered through the SHARS program.

Comment: HHSC received a comment from the Workgroup related to the lack of language in §363.605 dealing with a beneficiary's right to appeal eligibility and prior authorization decisions and seek a fair hearing.

HHSC Response: HHSC agrees with the Workgroup and will provide beneficiaries with access to the Medicaid fair hearing process. HHSC agrees to insert a new fair hearing provision at §363.605(j).

Comment: HHSC received from TAHC a suggestion to re-organize §363.605(a) and (b) in order to more clearly capture the kinds of services that may be provided under the new PCS benefit.

HHSC Response: HHSC agrees with the recommendation and has reorganized §363.605(a) and (b) as proposed by TAHC.

Comment: HHSC received comments from the Workgroup concerning §363.605(c) and its requirement that PCS providers submit a prior authorization request to deliver personal care services to a Texas Health Steps beneficiary. Workgroup members expressed the opinion that if the Texas Department of State Health Services (DSHS) case managers conduct the assessment of the beneficiary, the case managers should seek the authorization as well, rather than the provider who will receive a referral from DSHS. The Workgroup contended that this only adds an unnecessary layer of bureaucracy for the providers.

HHSC Response: HHSC agrees with the Workgroup. HHSC is modifying all of §363.605(c) to align the rules with DSHS's role in the provision of the new PCS benefit as of September 1, 2007. DSHS will seek prior authorization of PCS services after conducting an assessment of the Medicaid beneficiary and finding him/her eligible to receive PCS. Also, HHSC is adding a new subsection (d) to §363.605 to clarify that the written statement of need by the beneficiary's physician or usual source of care must be on file with HHSC or its designee within 60 days of the initial start of care.

Comment: HHSC received comments from TAHC questioning whether the State will have the necessary resources to perform a comprehensive assessment of a beneficiary, as stated in §363.605(c), if the under-21 PCS benefit is moved to HHSC from DADS. TAHC also stated that the proposed rules do not address the anticipated involvement of DSHS personnel in completing the assessment. TAHC was also concerned that children without a need for skilled services (e.g., nursing services) would have to endure a comprehensive assessment when the basis for providing PCS originates in a functional limitation.

HHSC Response: HHSC acknowledges the comment, but disagrees with TAHC's comments. DSHS will have adequate numbers of trained case managers to perform the assessment function as of September 1, 2007. HHSC does not believe that the new rules must explicitly state that DSHS will administer the assessments prior to a beneficiary's receiving services. Lastly, in both the interim phase and the long term, a child referred to DSHS as potentially eligible for PCS will be screened or evaluated for other services the child might need in addition to PCS, (e.g., skilled nursing, durable medical equipment, physical therapy). The interim phase of the PCS benefit will end when the new comprehensive assessment instrument being developed by the Texas A&M Public Policy Institute for use in the new PCS benefit is operational. The goal is the integration of the various levels of care a beneficiary may need. HHSC believes that a comprehensive assessment of a beneficiary's needs-not just personal care services needs-is vital to providing beneficiaries a range of services within a continuum of care.

Comment: HHSC received comments from TAHC regarding the inclusion of prior authorization requirements in §363.605, a rule supposedly detailing PCS benefits and limitations. TAHC asserted that placement of such language in the rule is inappropriate and that HHSC should create a separate rule for any prior authorization requirements.

HHSC Response: HHSC acknowledges receipt of the comment, but disagrees with TAHC's position. Prior authorization should be discussed within the "benefits and limitations" rule, as prior authorization is a means for assuring that a Medicaid benefit is provided only to beneficiaries for whom the benefit is medically necessary, as required by the Medicaid act. HHSC will retain the language as initially proposed.

Comment: HHSC received comments from the Workgroup and TAHC related to §363.605(d)(5). This paragraph requires HHSC to consider the functional abilities of typically developing children of a similar age when evaluating a Medicaid beneficiary's need for PCS. TAHC maintained that HHSC should strike subsection (d)(5) altogether on the ground that comparing the beneficiary who is requesting personal care services to a typically developing child of similar age will introduce subjectivity into the

eligibility determination process. Furthermore, TAHC argued that medical need for PCS is sufficiently established by the submission of a statement of need from the beneficiary's medical practitioner. The Workgroup did not recommend deletion of the entire §363.605(d)(5), but did urge HHSC to drop the term "significantly" in assessing whether the evaluated beneficiary's functional abilities are lower than that of typically developing peers. The Workgroup believed that removing "significantly" would greatly reduce the subjective element in determining the need for PCS.

HHSC Response: HHSC acknowledges the comments. It agrees with the Workgroup that the level of subjectivity in the assessment process can be reduced by removing "significantly" and will strike that language from §363.605(d)(5), now §363.605(e)(5). Nevertheless, HHSC does not agree with the TAHC recommendation to strike the subsection completely, as the comparison of the beneficiary's functional abilities with those of his/her peers should remain an important component in the assessment process.

Comment: HHSC received comments from the Workgroup concerning §363.605(g). This subsection states that HHSC will not reimburse for personal care services used for providing child care or respite. The Workgroup recommended deletion of these restrictions as it disagrees with HHSC on the definitions of "child care" and "respite." The Workgroup asserted that some forms of child care and respite are actually encompassed within the personal care services as defined by HHSC in the proposed rules. Additionally, the Workgroup maintained that HHSC's position on PCS with respect to child care and respite is short-sighted and potentially harmful toward Texas families.

Response: HHSC appreciates the comments submitted by the Workgroup on §363.605(g), now §363.605(h), but cannot modify the rule as recommended. Under the Texas Medicaid State Plan on file with and approved by the Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, HHSC cannot expend Medicaid funds in paying for PCS that are used for the purposes of providing beneficiaries with child care and respite services . HHSC will retain the language as initially proposed.

Comment: HHSC received comments from the Workgroup and TAHC concerning the reasons for terminating PCS proposed in §363.605(h)(5). Both groups commented that terminating a beneficiary's PCS benefit because of the provider's lack of compliance with Medicaid policies and procedures is inherently unfair. They argued that the beneficiary should retain eligibility and be allowed to select a new provider.

Response: HHSC acknowledges the comment and agrees with the Workgroup and TAHC. HHSC will modify the language and strike the proposed §363.605(h)(5), now §363.605(i)(5), as a reason for termination.

Comment: HHSC received a comment from the Workgroup related to places of service where PCS may be authorized, described in §363.607(b). The Workgroup recommended new language that will allow PCS to be authorized for a beneficiary in any community setting.

HHSC Response: HHSC accepts the comment provided by the Workgroup and agrees with the recommendation. HHSC will modify the language in §363.607(b) to reflect that PCS may be authorized in multiple community settings.

Comment: HHSC received comments from the Workgroup regarding §363.607(c). Some members of the Workgroup did not agree with the proposed requirement that the PCS place of service must be able to support the beneficiary's health and safety needs. The Workgroup maintained that HHSC does not need this requirement in rule, as the actual providers of PCS services must evaluate these conditions as part of their licensure requirements. The Workgroup recommended that HHSC delete this subsection and substitute a new §363.607(c) that is nearly identical to the initially proposed §363.607(b)(5), which prohibits the authorization of PCS in hospitals, nursing facilities, intermediate care facilities for the mentally retarded (ICF/MRs), or institutions for mental disease (IMDs).

Response: HHSC acknowledges the comments and agrees with the Workgroup's recommendation. HHSC will strike §363.607(c) as initially proposed and replace with a new §363.607(c) that will prohibit authorization of PCS in hospitals, nursing facilities, ICF/MRs, and IMDs.

The new rules are adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

§363.601. Eligibility and Medical Necessity Criteria.

(a) The purpose of this subchapter is to define personal care services available through the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT)-Comprehensive Care Program, which in Texas is known as the Texas Health Steps-Comprehensive Care Program.

(b) Personal care services may be provided to individuals who are under 21 years of age and eligible for EPSDT.

(c) Personal care services are medically necessary when a beneficiary requires assistance with activities of daily living (ADLs), instrumental activities of daily living (IADLs), or health related functions because of a physical, cognitive or behavioral limitation that is related to the beneficiary's disability or chronic health condition.

(d) This subchapter does not apply to personal care services delivered through the School Health and Related Services program.

§363.603. Provider Participation Requirements.

(a) Personal care services must be provided by an individual who:

(1) Is 18 years of age or older;

(2) Is an employee of a provider organization licensed as a home and community support services agency (HCSSA) as per Title 40, Part 1, Chapter 97 of the Texas Administrative Code, or an employee of the beneficiary, or the beneficiary's parent or guardian, if the beneficiary is receiving personal care services through the consumer directed services (CDS) option described in 40 TAC, Chapter 41 (relating to Consumer Directed Services Option).

(3) Has demonstrated competence, when competence cannot be demonstrated through education and experience, to perform the personal assistance tasks assigned by the provider organization supervisor, the beneficiary, or the beneficiary's parent or guardian acting as employer through the CDS option described in 40 TAC, Chapter 41 (relating to Consumer Directed Services Option).

(4) Is not a legal or foster parent, or guardian, of the beneficiary who is a minor child who receives the service; and

(5) Is not the legal spouse of the beneficiary who receives the service.

(b) HHSC may establish rates of reimbursement based on the level of care required by the beneficiary and the qualifications of and tasks performed by the personal care services attendant.

(c) An organization providing personal care services must meet the licensing standards set out in 40 TAC, Chapter 97 (relating to Licensing Standards for Home and Community Support Services Agencies) for one of the following license categories or special service types:

(1) Licensed Home Health Services, as set out in 40 TAC §97.401 (relating to Standards Specific to Licensed Home Health Services);

(2) Licensed and Certified Home Health Services, as set out in 40 TAC §97.402 (relating to Standards Specific to Licensed and Certified Home Health Services); or

(3) Agencies licensed to provide personal assistance services, as set out in 40 TAC §97.404 (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services).

(d) An organization serving as a Consumer Directed Services Agency (CDSA), providing financial management services and other employer support services to a client receiving personal care services through the CDS modality, must meet the CDSA contracting requirements specified in 40 TAC Chapters 41 and 49 (relating to Consumer Directed Services Option and Contracting for Community Care Services).

(e) Provider organizations and CDSAs, must successfully enroll as a Texas Medicaid provider prior to seeking authorization or payment for personal care services.

§363.605. Benefits and Limitations.

(a) Personal care services are support services provided to an EPSDT beneficiary who requires assistance with activities of daily living (ADLs), instrumental activities of daily living (IADLs), and health-related functions due to physical, cognitive, or behavioral limitations related to his or her disability or chronic health condition.

(b) Personal care services may include:

(1) ADLs that include, but are not limited to, eating, toileting, grooming, dressing, bathing, transferring, maintaining continence, positioning, and mobility.

(2) IADLs that include, but are not limited to, personal hygiene, meal preparation, grocery shopping, light housework, laundry, communication, transportation, and money management.

(3) Health-related functions that include, but are not limited to, medication management, range of motion, exercise, skin care, use of durable medical equipment, reporting the beneficiary's condition, including changes to the beneficiary's condition or needs, and completing appropriate records.

(4) Nurse-delegated tasks, including health maintenance activities, as permitted by the Texas Nursing Practice Act and its implementing regulations; and

(5) Hands-on assistance, cuing, redirecting, or intervening, to accomplish the task.

(c) Prior to authorizing personal care services, HHSC or its designee will require completion of:

(1) An assessment of the beneficiary with an HHSC-approved assessment form; and

(2) Any other documentation required by HHSC to complete the authorization process.

(d) An HHSC-approved written statement of need by the beneficiary's physician or usual source of care (i.e., a practitioner with ongoing clinical knowledge of, and a therapeutic relationship with, the beneficiary) must be on file with HHSC or its designee within 60 days of the initial start of care.

(e) In evaluating the request for personal care services, HHSC or its designee will determine the amount and duration of personal care services by taking into account the following:

(1) Whether the beneficiary has a physical, cognitive, or behavioral limitation related to a disability or chronic health condition that inhibits the beneficiary's ability to accomplish ADLs, IADLs, or related health functions;

(2) The parent/guardian's need to sleep, work, attend school, and meet their own medical needs;

(3) The parent/guardian's legal obligation to care for, support, and meet the medical, educational, and psycho-social needs of their other dependents;

(4) The parent/guardian's physical ability to perform the personal care services; and

(5) Whether or not the need to assist the family in performing personal care services on behalf of the client is related to a medical, cognitive, or behavioral condition that results in a level of functional ability that is below that expected of a typically developing child of the same chronological age.

(f) HHSC will not arbitrarily deny authorization of personal care services or reduce the number of requested hours of services based solely on the client's diagnosis, type of illness, or condition.

(g) A beneficiary may receive personal care services through the Consumer Directed Services (CDS) option defined in 40 TAC, Chapter 41 (relating to Consumer Directed Services Option).

(h) Personal care services limitations include the following:

(1) HHSC will not reimburse for personal care services used for or intended to provide:

(A) Respite care; or

(B) Child care.

(2) Personal care services shall neither replace parents or guardians as the primary care giver, nor provide all the care a beneficiary requires to live at home. Primary care givers remain responsible for a substantial portion of a beneficiary's daily care, and personal care services are intended to support the care of the beneficiary living at home.

(i) Authorization for personal care services will be terminated by HHSC or its designee when:

(1) The beneficiary is no longer eligible for Texas Medicaid;

(2) The beneficiary no longer meets the medical necessity criteria for personal care services;

(3) The place of service(s) can no longer meet the beneficiary's health and safety needs;

(4) The provider requests termination due to the beneficiary's lack of compliance with the service plan; or

(5) The authorization for personal care services expires.

(j) A beneficiary may request a fair hearing in the event that personal care services are denied, reduced, suspended or terminated, as per Chapter 357 of this title (relating to Hearings).

§363.607. Place of Service.

(a) Personal care services may be provided in an individual or group setting.

(b) Personal care services may be authorized for the following place(s) of service:

(1) The beneficiary's home;

(2) The home of the primary or alternate care giver;

(3) The beneficiary's school;

(4) The beneficiary's day care facility; or

(5) Any community setting in which the beneficiary is located.

(c) Personal care services may not be authorized in hospitals, nursing facilities, intermediate care facilities for the mentally retarded, or institutions for mental disease.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2007.

TRD-200703499
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: September 1, 2007
Proposal publication date: April 27, 2007
For further information, please call: (512) 424-6900

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CHAPTER 370. STATE CHILDREN'S HEALTH INSURANCE PROGRAM

The Texas Health and Human Service Commission (HHSC) adopts the amendments to Subchapter A, §370.4, Definitions; Subchapter B, Division 1, §370.20, Application Availability and File Date and §370.22, Completion of Telephone Applications; Subchapter B, Division 4, §370.43, Citizenship and Residency, §370.44, Income and Assets, and §370.46, Waiting Period; Subchapter B, Division 5, §370.51, Deadline and Method for Requesting Review, §370.52, Disposition of a Request for Review, and Subchapter C, Division 1, §370.303, Completion of Enrollment and §370.307 Continuous Enrollment Period; Subchapter C, Division 2, §370.325, Cost-Sharing Cap; and Subchapter D, §370.401, Perinates.

HHSC adopts the repeal of §370.23, Application Contents under Subchapter B, Division 1, and adopts the repeal of §370.53, Reconsideration by HHSC under Subchapter B, Division 5.

HHSC adopts new §370.60, Renewals, which includes information on when the renewal packet and reminder notices are sent, under Subchapter B, Division 6. HHSC adopts new §370.70, Income Eligibility Check during the 6th Month of Coverage, and new §370.71, Review and Reconsideration of Disenrollment Determination, which includes information on the process for performing an income check for households with income above 185% Federal Poverty Limit (FPL) and disenrollment of households subject to the income check, under Subchapter B, Division 7.

HHSC amends the title of Subchapter B to align the title of the chapter to improve the description of the information contained with the subchapter. The new name is "Application Screening, Referral, Processing, Renewal, and Disenrollment".

The rules are adopted without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4109) and will not be republished.

House Bill 109, 80th Legislature, Regular Session, 2007, requires HHSC to make changes to eligibility and cost sharing policy and procedures. The changes include allowing a child care deduction, modifying the 90 day wait policy, extending the enrollment period, updating the cost-sharing cap, increasing household asset limit and vehicle excess value exclusion amounts, and conducting an income eligibility check for households with income above 185% Federal Poverty Limit (FPL).

In addition, HHSC is aligning rules with current process due to policy clarifications and process improvement changes. These changes include clarifying file date policy, allowing clients to select a health plan via telephone, defaulting clients into a health plan who fail to choose one, clarifying the definition of countable income, clarifying that the value of unlicensed or inoperable vehicles must be counted in the eligibility determination, and deleting references to HHSC's designee and references to reconsideration by HHSC due to a shift in the request for review functions from the vendor to state staff.

Amended §370.4 updates the definition of countable income to exclude the income of children or siblings under age 18 who attend school, deletes information related to regular or predictable income; adds a definition of net budget group income; and renumbers the definitions as appropriate.

The Subchapter B title is amended to more accurately describe the contents of the subchapter.

The adopted amendment to §370.20 clarifies that the file date for applications received via telephone or internet is the date a name and address is provided as long as the signature is received by the final due date.

The adopted amendment to §370.22 deletes a reference to an obsolete section.

The repeal of §370.23 removes information regarding the contents of the application.

The adopted amendment to §370.43 simplifies language related to citizenship and residency.

The adopted amendment to §370.44 changes references from gross income to net income, changes the asset limit and vehicle exclusion amounts, and clarifies language to match existing policy.

The adopted amendment to §370.46 updates the 90-day waiting period criteria to apply a wait only to applicants who were covered by a health benefits plan during the 90 days prior to application.

The adopted amendments to §370.51 and §370.52 remove the word designee as HHSC now handles the request for review functions rather than the vendor and remove references to HHSC timeframes.

The repeal of §370.53 removes information related to reviews due to the shift in responsibility for request for review functions from the vendor to state staff thus making the reconsideration by HHSC obsolete.

The adopted new §370.60 describes the renewal process.

The adopted new §370.70 provides information related to performing an income check for households with income above 185% FPL in the 6th month of coverage.

The adopted new §370.71 provides information related to disenrollment of households and HHSC requirements during a request for review.

The adopted amendment to §370.303 adds telephone as a method to select a health plan or Primary Care Provider (PCP) and defaults members into a health plan if they fail to choose a health plan.

The adopted amendment to §370.307 increases the enrollment period from six to twelve months.

The adopted amendment to §370.325 adjusts the cost-sharing cap to a twelve month amount based on the household's net income instead of gross income.

The adopted amendment to §370.401 exempts Perinates from the six month income verification requirement.

The 30-day comment period ended August 6, 2007, and HHSC did not receive any comments. HHSC held a public hearing on July 19, 2007, during which no comments or testimony was received regarding the proposed rules.

SUBCHAPTER A. PROGRAM ADMINISTRATION

1 TAC §370.4

Statutory Authority

The amendment is adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2007.

TRD-200703500
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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SUBCHAPTER B. APPLICATION SCREENING, REFERRAL, PROCESSING, RENEWAL, AND DISENROLLMENT

DIVISION 1. APPLICATION PROCESSES

1 TAC §370.20, §370.22

Statutory Authority

The amendments are adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
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Texas Health and Human Services Commission
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DIVISION 4. ELIGIBILITY CRITERIA

1 TAC §§370.43, 370.44, 370.46

Statutory Authority

The amendments are adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Effective date: September 1, 2007
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For further information, please call: (512) 424-6900

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DIVISION 5. REVIEW AND RECONSIDERATION OF ELIGIBILITY DENIALS AND TEMPORARY ENROLLMENT

1 TAC §370.51, §370.52

Statutory Authority

The amendments are adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety

Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
Chief Counsel
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Proposal publication date: July 6, 2007
For further information, please call: (512) 424-6900

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DIVISION 6. RENEWAL PROCESS

1 TAC §370.60

Statutory Authority

The new rule is adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 424-6900

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DIVISION 7. DISENROLLMENT

1 TAC §370.70, §370.71

Statutory Authority

The new rules are adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
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For further information, please call: (512) 424-6900

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SUBCHAPTER B. APPLICATION SCREENING, REFERRAL AND PROCESSING

DIVISION 1. APPLICATION PROCESSES

1 TAC §370.23

Statutory Authority

The repeal is adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 5. REVIEW AND RECONSIDERATION OF ELIGIBILITY DENIALS AND TEMPORARY ENROLLMENT

1 TAC §370.53

Statutory Authority

The repeal is adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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SUBCHAPTER C. ENROLLMENT, DISENROLLMENT, AND RENEWAL OF MEMBERSHIP

DIVISION 1. ENROLLMENT

1 TAC §370.303, §370.307

Statutory Authority

The amendments are adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
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Texas Health and Human Services Commission
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DIVISION 2. COST-SHARING REQUIREMENTS

1 TAC §370.325

Statutory Authority

The amendment is adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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SUBCHAPTER D. ELIGIBILITY FOR UNBORN CHILDREN

1 TAC §370.401

Statutory Authority

The amendment is adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
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TITLE 10. COMMUNITY DEVELOPMENT

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 300. ADMINISTRATION

10 TAC §300.5

The Texas Residential Construction Commission (commission) adopts amendments to 10 TAC §300.5 regarding Task Forces with no changes to the text as published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3944).

The amendments are adopted to eliminate references in the rule to the Arbitration Task Force, which has completed its statutory responsibilities and the statutory section requiring the task force expires on September 1, 2007. Further, the current rule language provides for the abolition of the Arbitration Task Force at the conclusion of its statutory duties on September 1, 2007.

In addition, the commission is reviewing the necessity of this rule under the requirements of Government Code §2001.39, which requires each state agency to periodically review its rules. Government Code §2110.005 requires an agency that establishes an advisory committee, which is defined to include a task force, to adopt rules for the establishment of those committees.

The term "task force" is replaced with "advisory committee" throughout in order to use the same language as in the Government Code, now that all three task forces required by the commission's enabling Act have expired.

The commission received no comments on the proposed amendments.

The amendments are adopted pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code, Property Code §436.004, which provides for the creation of a Arbitration Task Force, and which expires by operation of law on September 1, 2007; Government Code §2001.39, which requires state agencies to periodically review their rules, and Government Code Chapter 2110, regarding the establishment of agency advisory committees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703541
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: September 2, 2007
Proposal publication date: June 29, 2007
For further information, please call: (512) 463-2886

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10 TAC §300.6

The Texas Residential Construction Commission (commission) adopts new rule 10 TAC §300.6 regarding fees adopted by the commission with no changes to the text as published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3946).

The new rule provides that the commission will adopt fees to implement Title 16 of the Property Code and will review those rules at least annually. The new rule is adopted as a part of a rule review pursuant to Texas Government Code §2001.39. The new rule is adopted as a part of a plan to consolidate Chapters 300, 301 and 302 of Title 10, Part 7 of the Texas Administrative Code, because all three chapters currently contain rules related to general agency administration. The new rule incorporates the current language of §302.1 with amendments to the rule language as a result of legislative changes to the commission's enabling Act passed during the 80th Regular Session of the Texas Legislature.

The commission received no comments on the proposed new rule.

The new rule is adopted pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code chapters 416, 426, and 427; Property Code §408.002, regarding the adoption of fees by the commission, §408.005, regarding the collection of amounts due the commission, and §417.003 regarding fees for registration as an arbitrator. In addition, the new rule is adopted as part of an agency rule review plan pursuant to Government Code §2001.39.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703545
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: September 2, 2007
Proposal publication date: June 29, 2007
For further information, please call: (512) 463-2886

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10 TAC §300.7

The Texas Residential Construction Commission (commission) adopts new rule 10 TAC §300.7 regarding Fees for Public Information with no changes in the text as published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3946). The new rule provides that the commission will charge fees for providing responses to requests for information pursuant to the Public Information Act in accordance with applicable law. The new section refers to the rules adopted by the Office of the Attorney General found in Title 1 of the Texas Administrative Code in §§70.1 - 70.11. The Attorney General's new rules became effective February 22, 2007.

In addition the new section includes changes to the commission's enabling Act exempting from charges agency information provided in response to a request under Property Code §409.001. The new section is adopted as a part of a rule review plan undertaken by the commission pursuant to Government Code §2001.39, which requires state agencies to periodically review adopted rules to determine if the initial reason for the rule still exists. Chapter 552 of the Government Code governs the charges for responding to requests for public information and assigns the task of setting those fees by rule to the Office of the Attorney General. The agency's rule plan moves the current agency fee rule for public information from 10 TAC §302.2 to 10 TAC §300.7 as part of an overall scheme to consolidate agency administrative rules into one chapter.

The commission received no comments on the proposed new rule.

The new rule is adopted pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code and §408.002, regarding charges for certain information provided by the commission under §409.001; Texas Government Code, Chapter 552 (Public Information) Subchapter F (Charges for Providing Copies of Public Information) and Government Code §2001.39, which requires that agencies periodically review their rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703542

Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: September 2, 2007
Proposal publication date: June 29, 2007
For further information, please call: (512) 463-2886

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CHAPTER 302. FEES

10 TAC §302.1

The Texas Residential Construction Commission ("commission") adopts the repeal of 10 TAC §302.1, concerning fees adopted by the commission with no changes to the text as published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3948).

The repeal is part of an overall plan to consolidate rules found in 10 Texas Administrative Code Chapters 300, 301, and 302 as part of an agency rule review undertaken pursuant to requirements of Government Code §2001.39.

The commission received no comments on the proposed repeal.

The repeal is adopted pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703543
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: September 2, 2007
Proposal publication date: June 29, 2007
For further information, please call: (512) 463-2886

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10 TAC §302.2

The Texas Residential Construction Commission (commission) adopts the repeal of 10 Texas Administrative Code §302.2 (10 TAC §302.2) regarding fees charged for public information with no changes in the text as published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3948).

The repeal is part of an overall plan to consolidate rules found in 10 Texas Administration Code Chapters 300, 301, and 302 as a part of an agency rule review undertaken pursuant to Texas Government Code §2001.39.

The commission received no comments on the proposed repeal.

The repeal is adopted pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16; Government Code Chapter 552, which determines the fees that at agency can charge for responding to requests for public information and Government Code §2001.39, requiring periodic agency review of rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

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Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: September 2, 2007
Proposal publication date: June 29, 2007
For further information, please call: (512) 463-2886

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 1. LIBRARY DEVELOPMENT
SUBCHAPTER A. LIBRARY SERVICES AND TECHNOLOGY ACT STATE PLAN

13 TAC §1.21, §1.22

The Texas State Library and Archives Commission adopts amendments to 13 TAC §1.21 and §1.22, regarding the state plan for federal funds without changes to the text as published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3949).

These amendments bring the rules into alignment with the requirements of the program's federal funding source by updating the wording in the rules.

No comments were received regarding the proposed amendments.

The amendments are adopted under the authority of Government Code §441.006 that permits the commission to accept, receive, and administer federal funds, and §441.009 that permits the commission to adopt a state plan for improving library services.

The amendments affect the Government Code §441.006 and §441.009.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703536
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Effective date: September 2, 2007
Proposal publication date: June 29, 2007
For further information, please call: (512) 463-5459

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SUBCHAPTER C. MINIMUM STANDARDS FOR ACCREDITATION OF LIBRARIES IN THE STATE LIBRARY SYSTEM

13 TAC §1.78

The Texas State Library and Archives Commission adopts the repeal of 13 TAC §1.78, regarding the county librarian's certificate, without changes to the proposal as published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3950).

Senate Bill 913 has repealed Government Code §441.007 which provided the commission the statutory authority to certify county librarians. The agency therefore adopts the repeal of 13 TAC §1.78.

No comments were received regarding the proposed repeal.

The repeal is adopted under the authority of Senate Bill 913 (80th Legislature, Regular Session) that repeals the authority of the commission to certify county librarians.

The repeal affects the Government Code §441.007.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703538
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Effective date: September 2, 2007
Proposal publication date: June 29, 2007
For further information, please call: (512) 463-5459

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13 TAC §§1.81, 1.83, 1.84

The Texas State Library and Archives Commission adopts the amendments to 13 TAC §1.81, 1.83, and 1.84, regarding minimum standards for accreditation of libraries in the state library system and professional librarians. Section 1.81 is adopted with changes to the proposed text as published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3950). A word change was made in §1.81(b)(3)(E) for editorial consistency. Section 1.83 and §1.84 are adopted without changes to the proposed text as published.

The amendments to §1.81 and §1.83 remove outdated sections of the rules, standardize the language and clarify the intent. The amendment to §1.84 is necessary to continue special treatment to certain librarians who were granted special consideration under 13 TAC §5.5, which is being repealed by Senate Bill 913 that repeals the authority of the commission to certify county librarians. The agency therefore adopts the amendments to 13 TAC §§1.81, 1.83, and 1.84.

No comments were received regarding the proposed amendments.

The amendments are adopted under the authority of Senate Bill 913 (80th Legislative, Regular Session) that repeals the authority of the commission to certify county librarians, and §441.123 that directs the commission to establish and develop a state library system, and §441.136 that authorizes the director and librarian to adopt rules necessary for the administration of the program.

The amendments affect Government Code §§441.007, 441.123, and 441.136.

§1.81. Quantitative Standards for Accreditation of Library.

(a) The definition of "local fiscal year" is the fiscal year in which January 1 of that year falls.

(b) The following are the minimum requirements for membership in the state library system:

(1) A library serving a population of at least 500,001 persons must:

(A) have local expenditures amounting to at least $13.00 per capita in local fiscal years 2007, 2008, 2009; $13.40 per capita in local fiscal years 2010, 2011, 2012; $13.82 per capita in local fiscal years 2013, 2014, 2015.

(B) have at least one item of library materials per capita or expend at least 25% of the local expenditures on the purchase of library materials;

(C) be open for service not less than 64 hours per week;

(D) employ a library director for at least 40 hours per week in library duties; and

(E) employ twelve full-time professional librarians, with one additional full-time professional librarian for every 50,000 persons above 500,000; an additional professional librarian must be assigned full time to system duties if the library is a major resource center.

(2) A library serving a population of 200,001 - 500,000 persons must:

(A) have local expenditures amounting to at least $11.25 per capita in local fiscal years 2007, 2008, 2009; $11.60 per capita in local fiscal years 2010, 2011, 2012; $11.95 per capita in local fiscal years 2013, 2014, 2015;

(B) have at least one item of library materials per capita or expend at least 25% of the local expenditures on the purchase of library materials;

(C) be open for service not less than 64 hours per week;

(D) employ a library director for at least 40 hours per week in library duties; and

(E) employ six full-time professional librarians, with one additional full-time professional librarian for every 50,000 persons above 200,000; an additional professional librarian must be assigned full time to system duties if the library is a major resource center.

(3) A library serving a population of 100,001 - 200,000 persons must:

(A) have local expenditures amounting to at least $9.00 per capita in local fiscal years 2007, 2008, 2009; $9.30 per capita in local fiscal years 2010, 2011, 2012; $9.60 per capita in local fiscal years 2013, 2014, 2015;

(B) have at least one item of library materials per capita or expend at least 25% of the local expenditures on the purchase of library materials;

(C) be open for service not less than 54 hours per week;

(D) employ a library director for at least 40 hours per week in library duties; and

(E) employ four full-time professional librarians, with one additional full-time professional librarian for each 50,000 persons above 100,000; an additional professional librarian must be assigned full time to system duties if the library is a major resource center.

(4) A library serving a population of 50,001 - 100,000 persons must:

(A) have local expenditures amounting to at least $7.50 per capita in local fiscal years 2007, 2008, 2009; $7.75 per capita in local fiscal years 2010, 2011, 2012; $8.00 per capita in local fiscal years 2013, 2014, 2015;

(B) have at least one item of library materials per capita or expend at least 25% of the local expenditures on the purchase of library materials;

(C) be open for service not less than 48 hours per week;

(D) employ a library director for at least 40 hours per week in library duties; and

(E) employ at least two full-time professional librarians.

(5) A library serving a population of 25,001 - 50,000 persons must:

(A) have local expenditures of at least $5.00 per capita in local fiscal years 2007, 2008, 2009; $5.15 in local fiscal years 2010, 2011, 2012; $5.31 per capita in local fiscal years 2013, 2014, 2015;

(B) have at least one item of library materials per capita or expend at least 25% of the local expenditures on the purchase of library materials;

(C) be open for service not less than 40 hours per week;

(D) employ a library director for at least 40 hours per week in library duties; and

(E) employ at least one full-time professional librarian.

(6) A library serving a population of 10,001 - 25,000 persons must:

(A) have local expenditures of at least $4.00 per capita in local fiscal years 2007, 2008, 2009; $4.12 per capita in local fiscal years 2010, 2011, 2012; $4.25 per capita in local fiscal years 2013, 2014, 2015;

(B) have at least one item of library materials per capita or expend at least 25% of the local expenditures on the purchase of library materials, provided that in either case a minimum of 7,500 items are held;

(C) be open for service not less than 30 hours per week; and

(D) employ a library director for at least 30 hours per week in library duties.

(7) A library serving a population of 5,001 - 10,000 must:

(A) have local expenditures of at least $3.75 per capita in local fiscal years 2007, 2008, 2009; $3.85 per capita in local fiscal years 2010, 2011, 2012; $3.97 per capita in local fiscal years 2013, 2014, 2015;

(B) have at least one item of library materials per capita or expend at least 25% of the local expenditures on the purchase of library materials; provided that in either case a minimum of 7,500 items are held.

(C) be open for service not less than 20 hours per week; and

(D) employ a library director for at least 20 hours per week in library duties.

(8) A library serving a population of 5,000 or fewer persons must:

(A) have local per capita expenditures or minimum total local expenditures, whichever is greater, of $3.50 per capita or $10,000 total in local fiscal years 2007, 2008, 2009; $3.60 per capita or $10,300 total in local fiscal years 2010, 2011, 2012; $3.70 per capita or $10,650 in local fiscal years 2013, 2014, 2015;

(B) have at least one item of library materials per capita or expend at least 25% of the local expenditures on the purchase of library materials, provided that in either case a minimum of 7,500 items are held;

(C) be open for service not less than 20 hours per week; and

(D) employ a library director for at least 20 hours per week in library duties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703539
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Effective date: September 2, 2007
Proposal publication date: June 29, 2007
For further information, please call: (512) 463-5459

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CHAPTER 5. COUNTY LIBRARIAN CERTIFICATION

13 TAC §§5.1 - 5.5, 5.7 - 5.9

The Texas State Library and Archives Commission adopts the repeal of 13 TAC §§5.1 - 5.5 and §§5.7 - 5.9, regarding county librarian certification without changes to the proposal as published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3953).

Senate Bill 913 has repealed Government Code §441.007 that provided the commission the statutory authority to certify county librarians. The agency therefore adopts the repeal of the county librarian certification rules.

No comments were received regarding the repeal of the rules.

The repeal is adopted under the authority of Senate Bill 913 (80th Legislature, Regular Session) that repeals the authority of the commission to certify county librarians.

The repeal affects the Government Code §441.007.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Assistant State Librarian
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Effective date: September 2, 2007
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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 303. GENERAL PROVISIONS

SUBCHAPTER B. POWERS AND DUTIES OF THE COMMISSION

16 TAC §303.41

The Texas Racing Commission adopts amendments to 16 TAC §303.41, Allocation of Race Dates without change to the proposed text as published in the June 22, 2007, issue of the *Texas Register* (32 TexReg 3822).

These amendments allow the Commission more flexibility in allocating live race dates to the racetrack associations. The amendments modify the current race date application deadline from the July 1 calendar year to a method by which the Commission may designate an application period upon its own motion or upon the request of an association. Once the Commission has designated an application period, the amendments require the Commission to publicize the application period to the affected associations at least 30 days before the closing date of the period.

The Commission received no comments in response to the published notice.

The amendments are adopted under the Texas Racing Act, Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting greyhound and horse racing and rules to administer the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703531
Mark Fenner
General Counsel
Texas Racing Commission
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Proposal publication date: June 22, 2007
For further information, please call: (512) 833-6699

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CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

16 TAC §309.6

The Texas Racing Commission adopts amendments to 16 TAC §309.6, Security for Compliance with changes to the proposed text as published in the June 22, 2007, issue of the *Texas Register* (32 TexReg 3823).

These amendments clarify that §6.04(b) of the Texas Racing Act allows the Commission to require security from both new and existing racetrack associations. The amendments enable the Commission to require security from an existing association that does not have a racetrack facility and that does not have security currently posted. The amendments also enable the Commission to require security from an existing licensee that does have a racetrack facility, but that did not conduct live racing in the previous calendar year and does not have security currently posted.

The Commission received one comment in response to the published notice. The commenter suggested two changes to the proposal. The first suggested change was that the Commission should retain discretion in determining the appropriate security estimate. The Commission agrees in part with the suggestion, and the adopted rule provides the Executive Secretary with additional flexibility to request updated data from the association. The second suggested change was to substitute the *force majeur* language from recently-issued security orders for that listed in the proposed rule. The Commission agrees with this suggestion and has incorporated the change into the adopted rule.

The amendments are adopted under the Texas Racing Act, Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting greyhound and horse racing and rules to administer the Act.

§309.6. Order for Security for Compliance.

(a) An association must post security in an amount determined by the Commission to adequately ensure:

(1) the association's compliance with the Act and the Rules;

(2) the association's completion of the racetrack facilities on or before the date approved by the Commission;

(3) the start of simulcast racing on or before the date approved by the Commission; and

(4) the start of live racing on or before the date approved by the Commission.

(b) Not later than 10 business days after the Commission issues its security order, the association must submit the security amount as directed.

(c) If an association has no posted security and the association has not completed its racetrack facilities or has failed to conduct live racing in the previous calendar year, the Commission may:

(1) approve a new date by which the association must complete its racetrack facilities;

(2) approve a date by which the association must begin simulcast racing;

(3) approve a date by which the association must begin live racing; and

(4) require the association to post security in amount determined by the Commission.

(d) In determining the amount of the security that the association shall post, the Executive Secretary shall prepare a security estimate proposal to be submitted to the Commission for consideration. In preparing the security estimate proposal the Executive Secretary shall:

(1) make security estimate calculations using wagering and operations data from:

(A) the association's application if the site location is the same as that provided in the original application; or

(B) updated data provided by the association at the request of the Executive Secretary.

(2) make security estimate calculations based on the following criteria:

(A) pari-mutuel tax due the general revenue fund from live wagering pools;

(B) pari-mutuel tax due the general revenue fund from simulcast same species wagering pools;

(C) pari-mutuel tax due the general revenue fund from simulcast cross-species wagering pools;

(D) the Racing Commission's general revenue dedicated account from live wagering pools and breakage;

(E) Texas Bred Incentive Program funds due the Racing Commission's general revenue dedicated account from simulcast same species wagering pools and breakage;

(F) Texas Bred Incentive Program funds due the Racing Commission's general revenue dedicated account from simulcast cross-species wagering pools and breakage;

(G) race day fees due the Racing Commission's general revenue dedicated account from live wagering as detailed under Section 309.8, Racetrack License Fees; and

(H) race day fees due the Racing Commission's general revenue dedicated account from simulcast wagering as detailed under Section 309.8, Racetrack License Fees.

(e) Cash, cashier's checks, surety bonds, irrevocable bank letters of credit, United States Treasury bonds that are readily convertible to cash, or irrevocable assignments of federally insured deposits in banks, savings and loan institutions, and credit unions are acceptable as security for purposes of this section. Interest earned on a United States Treasury bond or on an irrevocable assignment of a federally insured deposit is not subject to the assignment and remains the property of the association.

(f) If an association fails to conduct simulcast racing by the date approved by the Commission, the Commission shall forfeit to the state's general revenue fund and to the Texas Bred Incentive Programs that portion of the security that is appropriate for the amount of revenue lost to those funds. Exceptions to this requirement may be allowed only if the delay in performing is caused by conditions that are beyond the control of the association and which are not due to an act, omission, negligence, recklessness, willful misconduct, or breach of contract or law by the association. Such conditions include, but are not limited to, natural disasters, war, riots, crime, issuance of injunction or other court order, issuance of an order by an environmental or other agency, or strike.

(g) If an association fails to conduct live racing by the date approved by the Commission, the Commission shall forfeit to the state's general revenue fund and to the Texas Bred Incentive Programs that portion of the security that is appropriate for the amount of revenue lost to those funds. Exceptions to this requirement may be allowed only if the delay in performing is caused by conditions that are beyond the control of the association and which are not due to an act, omission, negligence, recklessness, willful misconduct, or breach of contract or law by the association. Such conditions include, but are not limited to, natural disasters, war, riots, crime, issuance of injunction or other court order, issuance of an order by an environmental or other agency, or strike.

(h) If an association is liable to the Commission for any accrued fees, penalties or interest, the Commission may forfeit any portion of the security that is appropriate for those fees, penalties or interest.

(i) After the association completes its first live race meet after posting security under this section, the Commission shall return the remaining security to the association.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mark Fenner
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §§153.1, 153.3, 153.7, 153.8, 153.15, 153.16, 153.19 - 153.22, 153.24, 153.37

The Texas Appraiser Licensing and Certification Board adopts amendments to §§153.1, 153.3, 153.7, 153.8, 153.15, 153.16, 153.19 - 153.22, 153.24, and 153.37. Sections 153.15, 153.21, and 153.37 are adopted with changes to the proposed text as published in the March 30, 2007, issue of the *Texas Register* (32 TexReg 1825). Sections 153.1, 153.3, 153.7, 153.8, 153.16, 153.19, 153.20, 153.22, and 153.24 are adopted without changes and will not be republished. The proposed amendments to §153.11 and §153.27 that appeared in the March 30, 2007, issue of the *Texas Register,* were not adopted by the Board.

The adopted amendment to §153.1 amends the definition of an appraiser trainee to reflect the new language recently approved in §152.21 regarding authorized supervisors.

Sections 153.3, 153.7, 153.16, and 153.24, adopts an amendment that replace outdated statutory references with the correct statutory references.

Section 153.8 adopts an amendment to include the new language relating to the trainee recently approved in §153.21 regarding authorized supervisors.

Section 153.15(d) and (e)(1) adopts an amendment regarding experience so it is consistent with the Appraiser Qualifications Board criteria and clarifies that a log and affidavit are required with an application as mandated by the Appraisal Subcommittee. Proposed amendments to §153.15(e)(6) - (10) were not adopted by the Board.

Section 153.19 adopts amendments clarifying the grounds for which an applicant who has been convicted of a criminal offense may have an application denied or a license or certification revoked. The amendments also clarify the factors that should be considered when evaluating applicants or licensees with criminal records.

Section 153.20 adopts an amendment detailing the types of conduct that could result in disciplinary action or denial of an application.

The adopted amendment to §153.21 requires that the sponsoring certified appraiser, appraiser trainee and any authorized supervisor must reside in Texas. Proposed amendment to §153.21(i) was not adopted by the Board

Section 153.22 adopts an amendment that clarifies that applicants must comply with the board rules and statutory provisions related to their pending application.

Section 153.37, adopts an amendment to add language clarifying the process for referring criminal matters to the appropriate law enforcement agency.

No comments were received.

The amendments are adopted under the Texas Appraiser Licensing and Certification Act, Subchapter D, Board Powers and Duties (Occupations Code, Chapter 1103), which provides the board with authority to adopt rules under §1103.151, Rules Relating to Certification and Licenses and §1103.154, Rules Relating to Professional Conduct.

§153.15. Experience Required for Certification or Licensing.

(a) An applicant for general real estate appraiser certification must provide evidence satisfactory to the board that the applicant possesses the equivalent of 3,000 hours of real estate appraisal experience over a minimum of 30 months. At least 1,500 hours of experience must be in non-residential real estate appraisal work. Hours may be treated as cumulative in order to achieve the necessary hours of appraisal experience.

(b) An applicant for residential real estate appraiser certification must provide evidence satisfactory to the board that the applicant possesses the equivalent of 2,500 hours of real estate appraisal experience over a minimum of 24 months. Hours may be treated as cumulative in order to achieve the necessary hours of appraisal experience.

(c) An applicant for a state real estate appraiser license must provide evidence satisfactory to the board that the applicant possesses at least 2,000 hours of real estate appraisal experience which was acquired over a minimum of twelve months.

(d) Experience credit shall be awarded by the board in accordance with current criteria established by the Appraiser Qualifications Board and in accordance with the provisions of the Act specifically relating to experience requirements. An hour of experience means 60 minutes expended in one or more of the acceptable appraisal experience areas. Calculation of the hours of experience must be based solely on actual hours of experience. Any one or any combination of the following categories may be acceptable for satisfying the applicable experience requirement. Experience credit may be awarded for:

(1) Fee or staff appraisal when it is performed in accordance with Standards 1 and 2 and other provisions of the Uniform Standards of Professional Practice (USPAP) in effect at the time of the appraisal.

(2) Ad valorem tax appraisal which:

(A) conforms to USPAP Standard 6; and

(B) demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1.

(3) Condemnation appraisal.

(4) Technical review appraisal to the extent that it demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1.

(5) Appraisal analysis. A market analysis typically performed by a real estate broker or salesman may be awarded experience credit when the analysis is prepared in conformity with USPAP Standards 1 and 2.

(6) Real property appraisal consulting services, including market analysis, cash flow and/or investment analysis, highest and best use analysis, and feasibility analysis when it demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1 and performed in accordance with USPAP Standards 4 and 5.

(7) Experience credit may not be awarded for teaching appraisal courses.

(e) Experience claimed by an applicant must be submitted on forms promulgated by the board.

(1) Experience claimed by an applicant shall be submitted upon an Appraisal Experience Log with an accompanying Appraisal Experience Affidavit.

(2) In exceptional situations, the board, at its discretion, may accept other evidence of experience claimed by the applicant.

(3) If a consumer complaint or peer complaint is brought against the applicant alleging fraud, incompetency, or malpractice and the board finds the complaint is reasonable or if the board determines other just cause exists for requiring further information, the board may obtain the additional information or documentation requested by:

(A) requiring the applicant to complete a form, prescribed by the board, that includes detailed listings of appraisal experience showing, for each appraisal claimed by the applicant, the city or county where the appraisal was performed, the type and description of the building or property appraised, the approaches to value utilized in the appraisal, the actual number of hours expended on the appraisal, name of client, and other information determined to be appropriate by the board; or

(B) engaging in other investigative research determined to be appropriate by the board.

(4) The board shall require verification of acceptable experience of no more than 5.0% of the applications selected by random sampling. The sampling shall be applied when a minimum of twenty approved applications are received. The verification may be obtained by:

(A) requiring the applicant to complete a form, prescribed by the board, that includes detailed listings of appraisal experience showing, for each appraisal claimed by the applicant, the city or county where the appraisal was performed, the type and

description of the building or property appraised, the approaches to value utilized in the appraisal, the actual number of hours expended on the appraisal, name of client, and other information determined to be appropriate by the board;

(B) engaging in other investigative research determined to be appropriate by the board; and

(C) allowing a minimum of 60 days after the date of selection for the applicant to prepare any records.

(5) Failure to comply with a request for verification of experience is a violation of these rules and may result in denial of certification or licensure, and any disciplinary action up to and including revocation.

(f) An applicant may be granted experience credit only for real property appraisals which:

(1) comply with the Uniform Standards of Professional Appraisal Practice (USPAP) in effect at the time of the appraisal; and,

(2) are verifiable and supported by workfiles in which the applicant is identified as participating in the appraisal process; and,

(3) were performed when the applicant had legal authority; and,

(4) comply with the acceptable categories of experience as per the AQB experience criteria and stated in subsection (d) of this section.

§153.21. Appraiser Trainees and Sponsors.

(a) A person desiring to be an appraiser trainee under the sponsorship of one or more state certified appraisers may apply to the board on the application form prescribed by the board on the application form prescribed by the board. For all applications received after March 31, 2006, a prospective appraiser trainee must meet the requirements set forth in §1103.353 of the Texas Appraiser Licensing and Certification Act, complete 75 creditable classroom hours as set forth in the Trainee Core Curriculum of the Appraiser Qualifications Board, and must pass the 15 hours National USPAP course and examination. A prospective trainee must be a citizen of the United States or a lawfully admitted alien; be at least 18 years of age; be a legal resident of this state for at least 60 days immediately before the filing of the application; and satisfy the board as to the prospective trainee's honesty, trustworthiness, and integrity. Once a person is approved as an appraiser trainee by the board, the person may perform appraisals or appraiser services only under the active, personal and diligent direction and supervision of a sponsoring certified appraiser unless one of the following events occurs:

(1) the appraiser trainee approval expires due to nonpayment of the annual renewal fee or the educational or experience requirements for renewal have not been met;

(2) the sponsorship is terminated by either the sponsor or the trainee, leaving the appraiser trainee without a sponsoring certified appraiser; or

(3) the trainee's authority to act has been suspended or revoked by the board.

(b) The sponsoring certified appraiser shall immediately notify the board in writing of any termination of sponsorship of an appraiser trainee, on a form prescribed by the board and pay a fee set by the board not later than the 10th day after the date of such termination. The board will notify the trainee that the sponsorship has been terminated.

(c) If an appraiser trainee's approval has expired or been revoked by the board or the trainee is no longer under the sponsorship of a certified appraiser, the appraiser trainee may not perform the duties of an appraiser trainee until an application to sponsor the trainee has been filed together with the appropriate fee and approved by the board.

(d) Certified appraisers who sponsor appraiser trainees or who sign a report shall be responsible to the public and to the board for the conduct of the appraiser trainee under the Act. After notice and hearing, the board may reprimand a sponsoring appraiser or may suspend or revoke a sponsoring appraiser's certification based on conduct by the appraiser trainee constituting a violation of the Act or a rule of the board.

(e) A certified appraiser may be added as a sponsor during the term of an appraiser trainee's authorization, by completing a form prescribed by the board and paying a fee set by the board, and shall assume all the duties, responsibilities, and obligations of an appraiser trainee sponsor as specified in these rules.

(f) The sponsoring certified appraiser, any authorized supervisor and the appraiser trainee must reside in this state.

(g) No individual shall sponsor more than three appraiser trainees at one time after December 31, 2007. Prior to January 1, 2008, individuals sponsoring three or more appraiser trainees may not take on any additional appraiser trainees nor shall they be allowed to renew any sponsorship which would result in the individual sponsoring more than three appraiser trainees.

(h) An approved appraiser trainee who signs an appraisal report must include his or her TALCB approval or authorization number and the word "Trainee."

(i) Certified appraisers may sponsor no more than three trainees at one time. Notification of sponsorship of an appraiser trainee must be provided in writing to the board on a form prescribed by the board with the appropriate fee prior to the assumption of sponsorship. Termination of sponsorship of an appraiser trainee must be provided in writing to the board on a form prescribed by the board with the appropriate fee prior to the release from sponsorship. A sponsor may designate another certified appraiser to serve as an authorized supervisor on specific appraisal projects for which state authorization is required. An authorized supervisor assumes the same responsibilities as a sponsor when supervising the work of an appraiser trainee.

(j) Certified appraisers who sponsor appraiser trainees must provide the trainee with access to any appraisals and work files completed under the sponsor or any authorized supervisor designated by the sponsor.

(k) Certified appraisers who sponsor appraiser trainees or serve as an authorized supervisor must be in good standing and not subject to any disciplinary action within the last two years that affects the supervisor's legal eligibility to engage in appraisal practice.

§153.37. Offenses with Criminal, Civil, and Administrative Penalties.

(a) A person not licensed or certified under the Act commits a Class A misdemeanor if the person engages in real estate appraisal, appraisal practice, or any appraisal related activity for which a certificate or license is required.

(b) A person not licensed or certified under the Act who engages in real estate appraisal, appraisal practice, or any appraisal related activity for which a certificate or license is required is liable for civil penalties of not less than the amount of the consideration received or more than three times the amount of the consideration received.

(c) A person not licensed or certified under the Act who engages in real estate appraisal, appraisal practice, or any appraisal re-

lated activity for which a certificate or license is required is liable for administrative penalties as set by the board.

(d) A person not licensed or certified under the Act commits a Class B misdemeanor if the person knowingly or intentionally uses any title, designation, initials, or other insignia or identification that would mislead the public as to the person's credentials, qualifications, competency, or ability to perform certified or licensed appraiser services.

(e) A person commits a Class B misdemeanor if the person knowingly or intentionally furnishes false information in connection with an affidavit filed pursuant to §153.15(e) of this title (relating to Experience Required for Certification or Licensing).

(f) The board's attorney, in matters determined to involve criminal conduct may refer a complaint to the appropriate state or federal law enforcement agency or prosecutorial authority for criminal investigation and prosecution. Regardless of whether a referral is made for investigation and prosecution, the matter shall be fully and appropriately investigated by the board's investigators and after completing such an investigation appropriate disciplinary action shall be taken by the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200703443
Troy Beaulieu
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Texas Appraiser Licensing and Certification Board
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For further information, please call: (512) 465-3959

PART 38. TEXAS MIDWIFERY BOARD

CHAPTER 831. MIDWIFERY

The Texas Midwifery Board (board), with the approval of the Executive Commissioner of the Health and Human Services Commission, adopts amendments to §§831.1 - 831.4, 831.7, 831.11 - 831.17, 831.20 - 831.23, 831.31 - 831.37, 831.40, 831.51, 831.52, 831.54, 831.57, 831.58, 831.60, 831.65, 831.70, 831.75, 831.101, 831.111, 831.121, 831.131, 831.141, and 831.161 - 831.173, and new §831.174, concerning the licensing and regulation of midwives. The amendments to §§831.13, 831.14, 831.32 and 831.162 are adopted with changes to the proposed text as published in the March 23, 2007, issue of the *Texas Register* (32 TexReg 1696). Sections 831.1 - 831.4, 831.7, 831.11, 831.12, 831.15 - 831.17, 831.20 - 831.23, 831.31, 831.33 - 831.37, 831.40, 831.51, 831.52, 831.54, 831.57, 831.58, 831.60, 831.65, 831.70, 831.75, 831.101, 831.111, 831.121, 831.131, 831.141, 831.161, and 831.163 - 831.173, and new §831.174 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments and new rule constitute the agency review of rules required by Government Code, §2001.039. The amendments clarify and update the rules, remove obsolete language, and ensure that the rules are consistent. The rule amendments also complete the implementation of House Bill (HB) 1535, 79th Legislature, Regular Session (2005), Sunset legislation, relating to the continuation and functions of the board; and the licensing and regulation of midwives. The new rule provides procedures consistent with the Administrative Procedure Act for issuance of a default order should a midwife fail to appear at a hearing at the State Office of Administrative Hearings.

SECTION-BY-SECTION SUMMARY

The amendment to §831.1 reflects the new section name.

Amendments to §831.2 reflect the addition of new language relating to standing orders in §831.52.

Amendments to §831.3 update the rules to include that board members may receive notification of meeting dates by e-mail.

Amendments to §831.4 remove unnecessary capitalization.

Amendments to §831.7 add the term "Midwifery Program Director" to ensure consistency with other sections of the rules.

Amendments to §831.11 reletter existing language to make the rules easier to read.

Amendments to §831.12 clarify that fees must be made payable to the department.

Amendments to §831.13 clarify the term for continuing education and list in detail the items already required on the current initial application forms approved by the board but not previously reflected in rule.

Amendments to §831.13 and §831.14 remove obsolete language and add the National Safety Council to the list of acceptable providers of cardio-pulmonary resuscitation (CPR) training. In response to a comment, new language is added to accept any provider of CPR initial or renewal certification for health care providers currently accepted by the department's Office of EMS/Trauma Systems Coordination.

Amendments to §831.14 clarify that licenses are issued for a two year term and list in detail the items already required on the current renewal application forms approved by the board but not previously reflected in rule.

Amendments to §831.15 clarify that a midwife who reapplies for licensure after failing to complete late renewal must meet the current requirements for an initial license.

Amendments to §831.16 clarify the term for continuing education.

Amendments to §831.17 include the word "also" for clarity.

Amendments to §831.20 include rule language related to failure to submit records or protocols based on the requirement already found in §831.165. The section has been relettered to reflect the insertion.

Amendments to §831.21 contain a grammatical correction.

Amendments to §831.22 reflect Sunset legislation in the change from "documentation" to "licensure" because midwives now receive a license and not a "letter of documentation."

Amendments to §831.23 correct existing language to specify that the board and not the hearings examiner must issue the final order concerning a disciplinary action.

Amendments to §831.31 specify that a midwife shall serve as vice-chair of the committee and state that all meetings of the committee are open to the public.

Amendments to §831.32 require that a midwifery student enrolled in an approved course must complete the course within a five year period, correct an error to ensure that the number of clinical hours required for graduation matches the national standard (1350 not 1360), and add the National Safety Council to the list of acceptable providers of cardio-pulmonary resuscitation (CPR) training. In response to a comment, new language is added to accept any provider of CPR initial or renewal certification for health care providers currently accepted by the department's Office of EMS/Trauma Systems Coordination.

Amendments to §831.33 provide additional specifics on what new and renewing basic midwifery education courses will be evaluated on, including how they teach protocol writing, and the types of files reviewed during a site visit. The language also specifies that the Education Committee Chair will appoint the midwife member of the site visit team.

Amendments to §831.34 include a non-substantive change in the placement of "and/or" in a sentence.

Amendments to §831.35 extend the time before a new exam application must be considered by the Education Committee from 60 to 90 days.

Amendments to §831.36 clarify that a complaint may be closed for either insufficient evidence or no violation.

Amendments to §831.37 remove the obsolete word "draft" and correct the name of a board publication.

Amendments to §831.40 include a non-substantive change from "and" to "and/or."

Amendments to §831.51 update internal references and remove obsolete language.

Amendments to §831.52 add new language on standing orders from a physician to emphasize that it is the responsibility of the midwife to ensure that standing orders are legal and current.

Amendments to §831.54 add new language reiterating that the midwife must assess the client on an ongoing basis for any factors which might preclude the client receiving midwifery care.

Amendments to §831.57 clarify that a midwife may initiate a non-emergency termination of care in accordance the requirements of the section for any reason.

Amendments to §831.58 remove the unnecessary repetition of the word "initiate."

Amendments to §831.60 amend and standardize existing wording to specify that all care required by rule must be documented in midwifery records.

Amendments to §831.65 include non-substantive rewording for clarity.

Amendments to §831.70 amend and standardize existing wording to specify that all care required by rule must be documented in midwifery records.

Amendments to §831.75 add new language to require a midwife to recommend to a client that the timing of the first newborn visit to the health care provider who will provide care after the first six weeks of life be pre-arranged in advance, and amend and standardize existing wording to specify that all care required by rule must be documented in midwifery records.

Amendments to §831.101 include a non-substantive clarification by adding the word "recommending."

Amendments to §831.111 reflect the name change from the Texas Department of Health to the Department of State Health Services.

Amendments to §831.121 include a non-substantive clarification from "he/she" to "the midwife."

Amendments to §831.131 include the Sunset Review follow-up requirement that the board include more explicit language in the rules on how the midwife is required to provide notice to the client regarding where to file a complaint.

Amendments to §831.141 reflect the name change from the Texas Department of Health to the Department of State Health Services.

Amendments to §831.161 specify that a midwife shall serve as vice-chair of the committee.

Amendments to §831.162 state that only jurisdictional complaints shall be processed through the complaints process. In response to a comment, new language is added to limit the time frame for filing a complaint to two years unless the Program Director, in conjunction with the Complaint Review Committee Chair, believes circumstances warrant consideration of the complaint for up to five years.

Amendments to §831.163 include a clarification that a complaint is "closed" not "dismissed."

Amendments to §831.164 include a clarification from "assigned" to "approved."

Amendments to §831.165 include minor, non-substantive wording corrections from "a" to "the" and from "and" to "and/or."

Amendments to §831.166 state that complaints presented to the committee must be jurisdictional.

Amendments to §831.167 clarify that a complaint may be resolved by a settlement conference and/or by an agreed order.

Amendments to §831.168 specify that the proposal for decision referred to the board is prepared by the Administrative Law Judge (ALJ).

Amendments to §831.169 clarify that a midwife may be required to participate in either basic or continuing midwifery education, and add new language to state that failure to comply with a board order is grounds for further disciplinary action. New language is also added to reflect the existing requirement that the board suspend a license for failure to pay child support in accordance with the Family Code, and deny renewal for default on a student loan in accordance with the Education Code.

Amendments to §831.170 clarify that a complaint may be closed for either insufficient evidence or no violation.

Amendments to §831.171 reletter existing language to make the rules easier to read.

Amendments to §831.172 add the wording "a licensee" to clarify that the board may also issue a cease and desist order if a licensee is violating the act or the rules.

Amendments to §831.173 reflect Sunset legislation in the change from "documentation" to "licensure."

New §831.174 provides procedures consistent with the Administrative Procedure Act for issuance of a default order should a midwife fail to appear at a hearing at the State Office of Administrative Hearings.

PUBLIC COMMENT

The board has reviewed and responded to the comments received regarding the proposed amendments and new rule during the comment period, which the commission has reviewed and accepts. The commenters were individuals, associations, and/or groups, including the following: two organizations, Medic First Aid International and the Association of Texas Midwives, and two individuals. The commenters were not against the rules in their entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments.

Comment: One commenter requested that Medic First Aid International be added to the list of approved cardio-pulmonary resuscitation (CPR) providers.

Response: The board agrees that provision should be made for the ongoing approval of additional providers and has amended the rules accordingly to accept any provider of CPR certification for health care providers currently accepted by the department's Office of EMS/Trauma Systems Coordination. Changes were made to §§831.13, 831.14, and 831.32 due to comments.

Comment: Two commenters opposed the amendment to §831.36 clarifying that a complaint may be closed for either insufficient evidence or no violation. The commenters requested only "no violation" be included in the final language.

Response: The board disagrees. The amendment reflects standard practice for all licensing boards and programs in the Department of State Heath Services Professional Licensing and Certification Unit. No change was made as a result of the comment.

Comment: Two commenters stated that the amendment to §831.60 repeats existing language at §831.51(g) and should therefore be deleted.

Response: The board agrees that the language reiterates the requirement in §831.51 but disagrees that the language, which emphasizes the requirement that a midwife document all care provided to the client, should be deleted. No change was made as a result of the comment.

Comment: Two commenters stated that issuance of a cease and desist order is a punishment and requested that the board amend the wording at §831.172 to require that a midwife be proven to be violating the law or rules before a cease and desist order is issued.

Response: The board disagrees. The rule text already includes a provision for notice and an opportunity for a hearing prior to issuance of an order. No change was made as a result of the comment.

Comment: Two commenters requested that the rules be amended to limit the amount of time available to file a complaint against a midwife from the current five years to a total of 12 months. One of the commenters also stated that some midwives are inciting women to file complaints against their previous midwives.

Response: The board agrees that the period should be limited and has amended the section to limit the period from five years to two years unless the Program Director, in conjunction with the Complaint Review Committee Chair, believes circumstances warrant consideration of the complaint for up to five years. The time limit in §831.162 was amended to reflect two years.

Comment: Two commenters requested that rules be amended to prohibit the board from taking any action based on an anonymous complaint, and to require that a complaint include a signed affidavit swearing that the statement is true.

Response: The board disagrees. In order to protect public health and safety, the board is willing to accept all complaints, and to investigate any complaint that provides sufficient evidence of a violation. This reflects standard practice for all licensing boards and programs in the Department of State Health Services Professional Licensing and Certification Unit. No change was made as a result of the comment.

Comment: One commenter requested that the rules be amended to state that the continuing education required for license renewal may be gained not only by taking a continuing education course, but also by serving as an instructor, if it is the first time the midwife has taught that course or workshop.

Response: The board disagrees because the requested change would be substantive and require re-publication of the rules. The board is willing to consider the comment during the next revision to this rule. No change was made as a result of the comment.

LEGAL CERTIFICATION

The Department of State Health Services Deputy General Counsel, Lisa Hernandez, certifies that the rules as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER A. THE BOARD

22 TAC §§831.1 - 831.4, 831.7

STATUTORY AUTHORITY

The adopted amendments are authorized by the Texas Occupations Code, §203.151, which provides that, subject to the approval of the Executive Commissioner of the Health and Human Services Commission, the Midwifery Board shall adopt substantive and procedural rules for the licensing of midwives and minimum standards for the practice of midwifery, including educational requirements, complaint and disciplinary procedures, reciprocity of licensing with other states, and such other duties as may be imposed by the Texas Occupations Code, Chapter 203. Review of the sections implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703580
Susan Chick
Chair
Texas Midwifery Board
Effective date: September 2, 2007
Proposal publication date: March 23, 2007
For further information, please call: (512) 458-7111 x6972

SUBCHAPTER B. LICENSURE

22 TAC §§831.11 - 831.17, 831.20 - 831.23

STATUTORY AUTHORITY

The adopted amendments are authorized by the Texas Occupations Code, §203.151, which provides that, subject to the ap-

proval of the Executive Commissioner of the Health and Human Services Commission, the Midwifery Board shall adopt substantive and procedural rules for the licensing of midwives and minimum standards for the practice of midwifery, including educational requirements, complaint and disciplinary procedures, reciprocity of licensing with other states, and such other duties as may be imposed by the Texas Occupations Code, Chapter 203. Review of the sections implements Government Code, §2001.039.

§831.13. Initial Application.

(a) Initial licensure. An individual may apply for licensure as a midwife at any time during the year by submitting the following to the Midwifery Program:

(1) a completed licensure application form which shall contain:

(A) specific information regarding personal data, social security number, birth date, other licenses held, and misdemeanor or felony convictions;

(B) the date of the application;

(C) a statement that the applicant has read Occupations Code, Chapter 203 (Act), and these rules and agrees to abide by them;

(D) a statement that the information in the application is truthful and that the applicant understands that providing false and misleading information on items which are material in determining the applicant's qualifications may result in the voiding of the application, or denial or the revocation of any license issued; and

(E) the signature of the applicant which has been dated; and

(F) any other information required by the Board.

(2) proof of:

(A) satisfactory completion of a mandatory basic midwifery education course approved by the Midwifery Board and the North American Registry of Midwives (NARM) exam or any other comprehensive exam approved by the Midwifery Board;

(B) certified professional midwife (CPM) certification by NARM and satisfactory completion of a continuing education course covering the current Texas Midwifery Basic Information and Instructors Manual; or

(C) satisfactory completion of a basic midwifery education course accredited by the Midwifery Education Accreditation Council (MEAC); a continuing education course covering the current Texas Midwifery Basic Information and Instructors Manual; and the North American Registry of Midwives (NARM) exam or any other comprehensive exam approved by the Midwifery Board;

(3) proof of current cardiopulmonary resuscitation (CPR) certification for health care providers by the American Heart Association; equivalent certification for the professional rescuer from the Red Cross; equivalent certification for healthcare and professional rescuer from the National Safety Council; or equivalent certification issued by any provider of CPR certification for health care providers currently accepted by the department's Office of EMS/Trauma Systems Coordination;

(4) proof of current certification for neonatal resuscitation, §§1 - 4, from the American Academy of Pediatrics;

(5) proof of satisfactory completion of training in the collection of newborn screening specimens or an established relationship with another qualified and appropriately credentialed health care provider who has agreed to collect newborn screening specimens on behalf of the applicant;

(6) a nonrefundable application fee; and

(7) proof of passing the jurisprudence examination approved by the Midwifery Board. The jurisprudence examination must have been taken no more than one year prior to the date of application.

(b) Initial licensure after interim of more than four years. A midwife seeking initial licensure who has not become licensed within four years of completing a basic midwifery education course approved by the Midwifery Board or accredited by MEAC shall in addition provide proof of having completed at least 40 contact hours of approved midwifery continuing education within the year preceding the application, which shall be based upon a review of:

(1) the current Texas Midwifery Basic Information and Instructors Manual; and

(2) the current Midwives Alliance of North America (MANA) Core Competencies and Standards of Practice.

§831.14. Renewal.

License renewal. Licensed midwives must apply for license renewal during the last January of each two-year renewal period. The Midwifery Program will send renewal applications to licensed midwives during the last December of each renewal period. However, each midwife is solely responsible for compliance with the requirements for license renewal, and nonreceipt of the renewal application mailed by the Midwifery Program shall not constitute an acceptable excuse for failure to comply. A midwife's application for license renewal must include the following:

(1) a completed license renewal application form which shall require the provision of the preferred mailing address and telephone number, and a statement of all misdemeanor and felony offenses for which the licensee has been convicted, along with any other information required by the Board;

(2) proof of completion of at least 20 contact hours of approved midwifery education since March 1 of the previous two-year renewal period;

(3) proof of current CPR certification for health care providers by the American Heart Association; equivalent certification for the professional rescuer from the Red Cross; equivalent certification for healthcare and professional rescuer from the National Safety Council; or equivalent certification issued by any provider of CPR certification for health care providers currently accepted by the department's Office of EMS/Trauma Systems Coordination;

(4) proof of current certification for neonatal resuscitation, §§1 - 4, from the American Academy of Pediatrics;

(5) a nonrefundable renewal fee; and

(6) proof of passing the jurisprudence examination approved by the Midwifery Board in the four years preceding renewal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 13, 2007.

TRD-200703581

Susan Chick
Chair
Texas Midwifery Board
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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. EDUCATION AND EXAMINATION

22 TAC §§831.31 - 831.37, 831.40

STATUTORY AUTHORITY

The adopted amendments are authorized by the Texas Occupations Code, §203.151, which provides that, subject to the approval of the Executive Commissioner of the Health and Human Services Commission, the Midwifery Board shall adopt substantive and procedural rules for the licensing of midwives and minimum standards for the practice of midwifery, including educational requirements, complaint and disciplinary procedures, reciprocity of licensing with other states, and such other duties as may be imposed by the Texas Occupations Code, Chapter 203. Review of the sections implements Government Code, §2001.039.

§831.32. Basic Midwifery Education.

(a) The Midwifery Program staff shall consider for approval only courses which have a course supervisor/administrator and site in Texas.

(b) Mandatory basic midwifery education shall:

(1) be offered to ensure that only trained individuals practice midwifery in Texas;

(2) be offered by any individual or organization meeting the requirements for course approval established by this subsection;

(3) include a didactic component which shall:

(A) be based upon and completely cover the most current Core Competencies and Standards of Practice of the Midwives Alliance of North America (MANA) and the current Texas Midwifery Basic Information Manual;

(B) prepare the student to apply for certification by North American Registry of Midwives (NARM); and

(C) include a minimum of 250 hours course work.

(4) be supervised and conducted by a course supervisor/administrator who shall:

(A) be responsible for all aspects of the course; and

(B) have two years of experience in the independent practice of midwifery, nurse-midwifery or obstetrics; and

(C) have been primary care giver for at least 75 births including provision of prenatal, intrapartum, and postpartum care; and

(D) have met initial licensure requirements; or

(E) be a Certified Professional Midwife (CPM); or

(F) be American College of Nurse Midwives (ACNM) certified; or

(G) be a licensed physician in Texas actively engaged in the practice of obstetrics.

(5) include didactic curriculum instructors who:

(A) have training and credentials for the course material they will teach; and

(B) are approved by the course supervisor/administrator.

(6) provide clinical experience/preceptorship of at least one year in duration but no more than five years in duration and equivalent to 1350 clinical contact hours which prepares the student to become certified by NARM, including successful completion of at least the following activities:

(A) serving as an active participant in attending 20 births;

(B) serving as the primary midwife, under supervision, in attending 20 additional births, at least 10 of which shall be out-of-hospital births;

(C) serving as the primary midwife, under supervision, in performing:

(i) 75 prenatal exams, including at least 20 initial history and physical exams;

(ii) 20 newborn exams; and

(iii) 40 postpartum exams.

(7) include preceptors who are approved by the course supervisor/administrator and shall be:

(A) licensed midwives;

(B) certified professional midwives;

(C) certified nurse midwives; or

(D) physicians licensed in the United States and actively engaged in the practice of obstetrics.

(c) Individuals enrolled as students in an approved midwifery course must possess:

(1) a high school diploma or the equivalent; and

(2) a current cardiopulmonary resuscitation (CPR) certificate for health care providers from the American Heart Association; an equivalent CPR certificate for the professional rescuer from the Red Cross; equivalent certification for healthcare and professional rescuer from the National Safety Council; or equivalent certification issued by any provider of CPR certification for health care providers currently accepted by the department's Office of EMS/Trauma Systems Coordination.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan Chick
Chair
Texas Midwifery Board
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SUBCHAPTER D. PRACTICE OF MIDWIFERY

22 TAC §§831.51, 831.52, 831.54, 831.57, 831.58, 831.60, 831.65, 831.70, 831.75, 831.101, 831.111, 831.121, 831.131, 831.141

STATUTORY AUTHORITY

The adopted amendments are authorized by the Texas Occupations Code, §203.151, which provides that, subject to the approval of the Executive Commissioner of the Health and Human Services Commission, the Midwifery Board shall adopt substantive and procedural rules for the licensing of midwives and minimum standards for the practice of midwifery, including educational requirements, complaint and disciplinary procedures, reciprocity of licensing with other states, and such other duties as may be imposed by the Texas Occupations Code, Chapter 203. Review of the sections implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan Chick
Chair
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SUBCHAPTER E. COMPLAINT REVIEW

22 TAC §§831.161 - 831.174

STATUTORY AUTHORITY

The adopted amendments and new rule are authorized by the Texas Occupations Code, §203.151, which provides that, subject to the approval of the Executive Commissioner of the Health and Human Services Commission, the Midwifery Board shall adopt substantive and procedural rules for the licensing of midwives and minimum standards for the practice of midwifery, including educational requirements, complaint and disciplinary procedures, reciprocity of licensing with other states, and such other duties as may be imposed by the Texas Occupations Code, Chapter 203. Review of the sections implements Government Code, §2001.039.

§831.162. Reporting Violations and/or Complaints.

Report of a complaint. Any person or agency may contact the Midwifery Program by telephone, in person, or in writing, alleging that a licensed midwife has violated the Act, any provisions of this subchapter, or any other law or rule relating to the practice of midwifery in Texas.

(1) Midwifery Program staff shall provide a complaint form to the complainant by mail within ten working days of being contacted by the complaint.

(2) The complaint review process begins when:

(A) the complaint form is received by the Midwifery Program;

(B) the Midwifery Program confirms that the subject of the complaint is a midwife licensed in Texas and/or practicing midwifery in Texas;

(C) the Midwifery Program confirms that the complaint is jurisdictional;

(D) the Midwifery Program confirms that the complaint alleges acts which took place not more than two years before the receipt of the complaint unless the Midwifery Program Director, in consultation with the Complaint Review Committee Chair, believes the complaint warrants consideration for acts which took place not more than five years before receipt of the complaint; and

(E) the Midwifery Program assigns a case number.

(3) If the complainant has provided his or her name and address, the Midwifery Program shall confirm receipt of the complaint form in writing within ten working days.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan Chick
Chair
Texas Midwifery Board
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 229. FOOD AND DRUG
SUBCHAPTER Z. INSPECTION FEES FOR RETAIL FOOD ESTABLISHMENTS

25 TAC §§229.470 - 229.474

The Executive Commissioner of the Health and Human Services Commission (commission) on behalf of the Department of State Health Services (department) adopts new §§229.470 - 229.474, concerning inspection fees for non-permitted retail food establishments. New §229.470 is adopted with a change to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4171). New §§229.471 - 229.474 are adopted without changes and, therefore, these sections will not be republished.

BACKGROUND AND PURPOSE

The purpose of these new rules is to implement Texas Health and Safety Code, §437.0125(c), which authorizes the department to collect fees for inspecting a facility. Facilities that are exempt from obtaining a Food Establishment Permit under 25 TAC, §229.371, but must comply with 25 TAC, §§229.161 - 229.171, and §§229.173 - 229.175, require inspections for various reasons such as other agency licensing requirements, federal mandates, governmental entities that do not have inspection staff, and requirements to receive federal grants or subsidies. As the

department is unable to recover the costs for these inspections, these new rules provide a process for such entities to request an inspection and pay an inspection fee prior to the department conducting the inspection.

SECTION-BY-SECTION SUMMARY

New §229.470 defines the purpose of these rules, which is to implement Texas Health and Safety Code, Chapter 437, which authorizes the department to collect fees to conduct inspections requested or required by certain food establishments when exempted from permitting by the department. New §229.471 provides definitions to clarify terminology. New §229.472 outlines the fees, applications procedures for requesting an inspection, and clarifies facilities subject to this rule. New §229.473 describes the minimum standards that facilities must follow when engaging in food service activities. New §229.474 explains the department's ability to refuse an inspection request, conduct hearings, and assess administrative penalties.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The commenters were organizations including the following: Bellevue Independent School District (ISD), Cleveland ISD, Big Spring ISD, Rice Consolidated ISD, Kennard ISD, and Comal ISD. The commenters were against the rules and objected to inspection fees.

Comment: Concerning the request for two inspections in §229.472(a)(1), two commenters stated that since the state requires the two inspections of the school cafeterias per year, then the state should conduct the inspections at no cost to the school districts.

Response: The commission disagrees because it is not the requirement of any state agency to have two inspections conducted. The Richard B. Russell National School Lunch Act was amended in 2004 to require that school districts that choose to participate in the National School Lunch Program or the School Breakfast Program must have the schools' foodservice establishments inspected twice per year. The federal law requires that a state or local governmental agency conduct the inspections, but did not provide any funding for the inspections. No change was made to the rule as a result of these comments.

Comment: Concerning the request for two inspections in §229.472(a)(1), one commenter stated that she was concerned that the department would be able to conduct the two inspections with the department's current inspection staff.

Response: The commission disagrees because House Bill 1, 80th Legislative Session, allows the department to hire additional inspectors to conduct the inspections. Anticipated revenue collected from the inspections fees will be used to fund the new staff. No change was made to the rule as a result of this comment.

Comment: Concerning the inspection fee in §229.472(a)(1)(A), five commenters stated it will be a burden for the school districts to pay the inspection fees and that the fees are unacceptable.

Response: The commission is sympathetic and understands the concerns stated by the commenters, but disagrees that the fees are unacceptable. The department does not currently have the funding or staff to implement the expanded school inspection services. The inspection fees will be used directly to implement the program, which includes processing the applications, and fees, inspection assignments, conducting of inspections, and inspection report review. The inspection fee was calculated based upon the current cost incurred by the department to conduct an inspection. No change was made to the rule as a result of these comments.

Comment: Concerning the inspection fee §229.472(a)(1)(A), one commenter stated that the schools will be paying the same fees as restaurants and that the fees should be lower than a for-profit establishment.

Response: The commission disagrees because restaurants and other retail food establishments are required to pay permit fees of $258, $515, or $773, based upon their gross annual volume of food sales. The establishments receive one inspection every 1 to 2 years, depending on the risk of the establishment. Schools will be inspected twice per year for $300. No change was made to the rule as a result of these comments.

Comment: Concerning §229.470, a commenter stated that Health and Safety Code, Chapter 437, "authorizes" but does not "require" inspection fees.

Response: The commission agrees and has revised §229.470 to state the word "authorizes" instead of the word "requires" in this section.

LEGAL CERTIFICATION

The Department of State Health Services, Deputy General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, Chapter 437, which authorizes the department to collect fees for inspecting facilities; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§229.470. Purpose.

The purpose of these sections is to implement Texas Health and Safety Code, Chapter 437, which authorizes the department to collect fees to conduct inspections requested or required by certain food establishments when exempted from permitting by the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2007.

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Lisa Hernandez
Deputy General Counsel
Department of State Health Services
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Proposal publication date: July 6, 2007
For further information, please call: (512) 458-7111 x6972

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 20. TEXAS PROCUREMENT AND SUPPORT SERVICES

SUBCHAPTER A. GENERAL PROVISIONS

34 TAC §20.1, §20.2

The Comptroller of Public Accounts adopts new §20.1, concerning purpose of Texas Procurement and Support Services (previously named the State Procurement and Support Services Office) and new §20.2, concerning business location and mailing address of Texas Procurement and Support Services, with changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4185).

House Bill 3560, transfers to the comptroller certain powers and duties of the Texas Building and Procurement Commission that do not primarily concern state facilities. Government Code, §2151.003(2) and §2151.004(d), transfer certain powers and duties of the Texas Building and Procurement Commission to the comptroller. Government Code, §2155.0011, transfers powers and duties under Government Code, Chapter 2155, to the comptroller and authorizes the comptroller to adopt rules to efficiently and effectively administer Government Code, Chapter 2155. Government Code, §2155.0012, requires the comptroller to conduct a public hearing before adopting those rules.

The new sections are adopted under Texas Administrative Code, Title 34, Part 1, new Chapter 20: Texas Procurement and Support Services, Subchapter A: General Provisions, and related to the functions and responsibilities of Texas Procurement and Support Services, pursuant to House Bill 3560, 80th Legislature, 2007. House Bill 3560 is effective September 1, 2007.

References to the State Procurement and Support Services Office in the rules as published in the *Texas Register* on July 6, 2007, have been revised in the adopted text to read Texas Procurement and Support Services, with conforming changes throughout.

Comments were received from the Texas Building and Procurement Commission as to the physical address for receipt of bids and other responses to solicitations. The physical address of Texas Procurement and Support Services for receipt of bids and other responses to solicitations will be specified in each of those solicitations. Other than to rename the division as Texas Procurement and Support Services rather than the State Procurement and Support Services Office, no changes are required to the text of the rule which establishes the official business address of Texas Procurement and Support Services.

The comptroller conducted a public hearing on August 8, 2007, to receive comments on these rules prior to submission of this adoption order.

The new sections are adopted under Government Code, §§2151.003, 2151.004, 2155.0011, and 2155.0012, which authorize the comptroller to adopt rules to efficiently and effectively administer these provisions.

The new sections implement Government Code, §§2155.003, 2151.004, 2155.0011, and 2155.0012.

§20.1. Purpose of Texas Procurement and Support Services.

Texas Procurement and Support Services is established within the Office of the Comptroller as a separate division and shall carry out the powers and duties transferred to the comptroller from the Texas Building and Procurement Commission and otherwise provided to the comptroller under House Bill 3560, 80th Legislature, 2007. These powers and duties include without limitation, statewide procurement, the historically underutilized business program, administrative support and offices for the State Council on Competitive Government, mail operations, printing and vehicle fleet management as provided in that legislation.

§20.2. Texas Procurement and Support Services Business Location and Mailing Address.

The business office of Texas Procurement and Support Services is located in the Lyndon Baines Johnson (LBJ) State Office Building, 111 E. 17th Street, Suite 104, Austin, Texas 78774. The mailing address for Texas Procurement and Support Services is: Texas Procurement and Support Services, Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2007.

TRD-200703522
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: September 1, 2007
Proposal publication date: July 6, 2007
For further information, please call: (512) 475-0387

SUBCHAPTER G. CONTRACT PROCEDURES

34 TAC §§20.381 - 20.386

The Comptroller of Public Accounts adopts new §20.381, concerning purpose, new §20.382, concerning application, new §20.383, concerning open meetings for certain contract awards, new §20.384, concerning protests, new §20.385, concerning negotiation and mediation of contract disputes and new §20.386, concerning statewide procurement advisory council, with changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4186).

House Bill 3560, transfers to the comptroller certain powers and duties of the Texas Building and Procurement Commission that do not primarily concern state facilities. Government Code, §2151.003(2) and §2151.004(d), transfer certain powers and duties of the Texas Building and Procurement Commission to the comptroller. Government Code, §2155.0011, transfers powers and duties under, Government Code, Chapter 2155, to the comptroller and authorizes the comptroller to adopt rules to efficiently and effectively administer Government Code, Chapter 2155. Government Code, §2155.0012, requires the comptroller to conduct a public hearing before adopting those rules. Government Code, §2155.086, establishes procedures for awards of certain contracts by the chief clerk of the comptroller or the chief clerk's designee. Government Code, §2155.087, establishes the Statewide Procurement Advisory Council and requires the comptroller to adopt rules describing the purposes and tasks of the council as provided by Government Code, §2110.005, and Government Code, §2155.087(c), requires the comptroller to conduct a public hearing before adopting these rules.

These new sections are adopted under Texas Administrative Code, Title 34, Part 1, new Chapter 20: Texas Procurement and Support Services (previously named the State Procurement and Program Support Services Office), Subchapter G: Contract Procedures, and relate to the powers and duties of the comptroller, pursuant to House Bill 3560, 80th Legislature, 2007, and housed by the comptroller in that division. House Bill 3560 is effective September 1, 2007.

Comments on proposed §20.382, concerning application, were received from the State Agency Coordinating Committee inquiring as to whether the chief clerk or his or designee were required to hold a state purchasing certificate. The chief clerk is the deputy comptroller of the comptroller's office, a statutory official who approves contract awards and signs formal contracts on behalf of the agency. The chief clerk is not a purchaser and does not issue purchase orders. Under Government Code, §403.003, the comptroller of public accounts, the statewide elected official, appoints a chief clerk who performs certain duties required by law or the comptroller. The chief clerk takes an official oath of office. If any contract awards by the chief clerk result in purchase orders, those will be issued by certified Texas purchasers on behalf of Texas Procurement and Support Services. No amendment to the text of the rule is necessary to address these comments.

Comments on proposed §20.383, concerning open meetings for certain contract awards, were received from the Texas Building and Procurement Commission expressing concern that the open meeting requirement to make contract awards for all contracts with an expected value of $100,000 or more and involving best value factors other than cost would considerably slow the procurement process. Comments were also received from the State Agency Coordinating Committee which requested clarification on the $100,000 threshold regarding routine purchases of items such as road aggregate and heavy equipment in which past performance and equipment aging reports are factors for consideration in contract award. The State Agency Coordinating Committee recommended that the Statewide Procurement Advisory Council established by House Bill 3560 focus its deliberations on strategic purchases rather than routine purchases. The State Agency Coordinating Committee also expressed the desire for clear timelines for the open meetings and for posting solicitations and meeting notices in the *Texas Register.* Regarding the contract awards for routine items such as road aggregate and heavy equipment, the Texas Building and Procurement Commission advises that of the 1100 or so open market contract awards by the Commission each fiscal year, only about 20 to 30 have typically involved best value factors other than cost. Thus, it is expected that only a small percentage of these routine purchases would be considered in an open meeting attended by the Statewide Procurement Advisory Council. To address the concerns about avoiding procurement delays, Texas Procurement and Support Services will establish a regular schedule of open meetings. The open meetings are subject to the provisions of the Texas Open Meetings Act and notices of all meetings will be posted as required by law and also provided to the State Agency Coordinating Committee. No change to the text of the rule is necessary to address these comments.

Comments on proposed §20.383, concerning open meetings for certain contract awards, were also received from the State Agency Coordinating Committee. The committee inquired as to whether this section applies to delegated or statutorily authorized purchases made by an agency that are not sent to Texas Procurement and Support Services. The committee also inquired as to whether exempt purchases would still be exempt and whether the open meeting process eliminated the possibility of reverse auctions on awards of $100,000 or more. The rules track the new statutory requirements of House Bill 3560 and the open meeting requirements only apply to contracts evaluated and awarded by Texas Procurement and Support Services. The rules do not modify existing exemptions and do not eliminate use of reverse auctions or any other purchase methods. The rules do not apply to purchase methods that do not involve consideration and evaluation, prior to contract award, by Texas Procurement and Support Services on best value evaluation factors other than cost. To address these comments, the rules are amended to clarify these points.

Comments on proposed §20.383, concerning open meetings for certain contract awards, were also received from the State Agency Coordinating Committee and the Texas Department of Transportation on the $100,000 value of certain contracts. The committee inquired as to the manner in which Texas Procurement and Support Services will determine whether a contract is reasonably expected to have a value of $100,000 or more over the life of the contract. The committee also inquired as to whether Texas Procurement and Support Services would accept an agency's anticipated contract value, and if not, to provide the criteria or methodology Texas Procurement and Support Services would use to make such a determination. The Texas Department of Transportation also recommended that the rule should better define reasonably expected in making this determination of value, including price escalation clauses, quantity increase provisions and options to extend or renew. In making this determination of value, Texas Procurement and Support Services may review all available information, including available renewals or extensions, pricing or quantity options, purchase requisitions, estimated budgets, legislative appropriations, market research, previous similar contracts, total previous agency purchase orders under a statewide contract and other pertinent information. For open market awards where Texas Procurement and Support Services is requested to evaluate and award a purchase order for an agency or other authorized entity, Texas Procurement and Support Services may consider an agency's expectation of contract value along with other available information. To address these comments, the rules are amended to clarify these points.

Comments on other aspects of proposed §20.383, concerning open meetings for certain contract awards, were also received from the State Agency Coordinating Committee. The committee inquired as to what documentation would be required to support the classification of a purchase as an emergency for which an open meeting would not be required. The emergency standard in House Bill 3560 and the rules is identical to that in current procurement law, that is, a purchase or other contract award for which delay would create a hazard to life, health, safety, welfare, or property or would cause undue additional cost to the state. An agency's or other authorized entity's documentation to support a request for an emergency contract award by Texas Procurement and Support Services would be the same as that to support an agency's own emergency purchase. To address these comments, the rules are amended to clarify these points.

Additional comments on proposed §20.383, concerning open meetings for certain contract awards, were also received from the State Agency Coordinating Committee. The committee inquired as to whether the dates and times of the open meetings determined by the chief clerk would conform to the Texas Open Meetings Act, Government Code, Chapter 551, and expressed

concern about the timeliness of contract awards. As required by House Bill 3560 and these rules, open meetings conducted by the chief clerk shall comply with the provisions of the Texas Open Meetings Act, Government Code, Chapter 551, including requirements relating to posting notices of the meetings. Texas Procurement and Support Services will also establish a schedule of regular meetings to avoid delays in awarding contracts. No amendment to the rules is necessary to address these comments.

Comments on proposed §20.383, concerning open meetings for certain contract awards, were also received from the Texas Department of Transportation. The department recommended that the rule should either be changed to remove the requirement for posting of provisional awards or clarify that all awards, both provisional and final, must be posted on the electronic state business daily at time of chief clerk award in open meeting and again after all negotiations are completed. As provided in House Bill 3560, Texas Procurement and Support Services must post notices of contract awards made in open meeting. An award in open meeting is tentative in that it does not bind the state until the contract is signed or a purchase order is issued; however, since the contract was awarded in an open meeting, the information regarding the tentative award is public information and may be posted on the electronic state business daily. Under House Bill 3560, Texas Procurement and Support Services will post notice of tentative awards made in the open meetings and will also comply with other procurement law that requires posting of final contract awards. No amendment to the rules is necessary to address these comments.

Comments on proposed §20.385, concerning negotiation and mediation of contract disputes, were received from the Texas Water Development Board. The board recommended that this section contain a citation to Government Code, Chapter 2260, relating to Certain Contract Claims against the State, in that Chapter 2260 supersedes any agency's rules. Section 20.385 incorporates by reference rules adopted by the comptroller under Texas Administrative Code, Title 34, Chapter 1, Subchapter F. These Subchapter F rules were adopted by the comptroller under Government Code, Chapter 2260, and make specific reference to same. No amendment to the rules is necessary to address this comment.

Comments on proposed §20.386, concerning the Statewide Procurement Advisory Council, were also received from the State Agency Coordinating Committee. The State Agency Coordinating Committee inquired as to whether Texas Procurement and Support Services would post the time frame for public award of open market contracts of $100,000 or more, including open meetings, that Texas Procurement and Support Services would meet (for example, not to exceed 30 days). Texas Procurement and Support Services will comply with the provisions of the Texas Open Meetings Act, Government Code, Chapter 551, and will also establish a schedule of regular meetings to avoid delays in awarding contracts. Texas Procurement and Support Services will revise the statewide Procurement Manual to suggest timeframes for submission of open market requisitions to ensure timely contract awards, taking into account those that must be awarded in open meetings. No amendment to the rules is necessary to address these comments.

Comments on proposed §20.386, concerning the Statewide Procurement Advisory Council, were also received from the Texas Building and Procurement Commission. The commission is concerned that members appointed to the Statewide Procurement Advisory Council will need to devote a large portion of their time to reviewing contracts to be awarded and meet frequently on a regular basis in order to avoid undue delay to the procurement needs of the state. The commission expressed that it may be desirable for members of the council to receive training in statewide procurement practices so that they are familiar with these practices and state law governing procurement. The Statewide Procurement Advisory Council consists of the following four members or their designees: one member appointed by the governor; one member appointed by the Texas Facilities Commission; one member appointed by the Department of Information Resources; and one member appointed by the Legislative Budget Board. Texas Procurement and Support Services will work with the council to ensure that all members are briefed on state laws and practices governing procurement. Also, the council members will receive training on the Texas Public Information Act and the Texas Open Meetings Act. To avoid any delays in awarding procurements and ensure attendance of a quorum of the Council, Texas Procurement and Support Services will establish a regular schedule of open meetings in which the Deputy Comptroller of the comptroller's office will consider contract awards. No amendment to the rules is necessary to address these comments.

References to the State Procurement and Support Services Office in the rules as published in the *Texas Register* on July 6, 2007, have been revised in the adopted text to read Texas Procurement and Support Services, with conforming changes throughout. For example, the definition of office was deleted from the definitions in the protest rules.

The comptroller conducted a public hearing on August 8, 2007, to receive comments on these rules prior to submission of this adoption order.

The new sections are adopted under Government Code, §§2151.003, 2151.004, 2155.0011, 2155.0012, 2155.086, 2155.087, and 2110.005, which authorize the comptroller to adopt rules to efficiently and effectively administer these provisions.

The new sections implement Government Code, §§2151.003, 2151.004, 2155.0011, and 2155.0012, 2155.086, 2155.087, and 2110.005.

§20.381. Purpose.

The purpose of this subchapter is to provide for the efficient and effective administration of the provisions of the Government Code relating to certain contract awards by Texas Procurement and Support Services established in §20.1 of this title (relating to Purpose of Texas Procurement and Support Services).

§20.382. Application.

Except as otherwise provided, this subchapter applies to the contracting and purchasing powers and duties of Texas Procurement and Support Services established in §20.1 of this title (relating to Purpose of Texas Procurement and Support Services).

§20.383. Open Meetings for Certain Contract Awards.

(a) This section applies only to the award of a contract by Texas Procurement and Support Services that:

(1) relates to the powers and duties transferred to the comptroller under Government Code, §2151.004(d);

(2) is reasonably expected by Texas Procurement and Support Services at the time of the award to have a value of $100,000 or more over the life of the contract;

(3) is evaluated based wholly or partly on best value factors other than cost; and

(4) is a contract for which the solicitation of bids or proposals or similar expressions of interest is published on or after September 1, 2007.

(b) This section does not apply to:

(1) the award of a contract by the chief clerk on behalf of divisions of the comptroller other than Texas Procurement and Support Services or for multiple divisions of the comptroller that also include Texas Procurement and Support Services that do not relate to the powers and duties transferred to the comptroller under Government Code, §2151.004(d);

(2) the award of a contract by the chief clerk that relate to the powers and duties of the comptroller to award such contracts prior to or notwithstanding the transfer of powers and duties of the comptroller under Government Code, §2151.004(d);

(3) the award of a contract by any state agency, local government or any other authorized entity under a statewide or master contract established by Texas Procurement and Support Services, including without limitation, a state term contract or Texas multiple award schedule contract;

(4) any part of the contracting process other than the award, including without limitation planning, budgeting, solicitation, pre-response conference, respondent presentation, evaluation, development of staff or evaluation committee recommendations, negotiation, and signature;

(5) the award of a contract by any state agency, local government or any other authorized entity under a contract that is not subject to or otherwise exempt from submission to, delegation by or other authority of Texas Procurement and Support Services;

(6) reverse auctions or any other purchase method that does not involve consideration and evaluation, prior to contract award, by Texas Procurement and Support Services on best value evaluation factors other than cost;

(7) a renewal, extension, or amendment of a contract provided for in the written solicitation for the original contract; or

(8) an emergency purchase or other contract award for which delay would create a hazard to life, health, safety, welfare, or property or would cause undue additional cost to the state.

(c) As used in this section, the chief clerk of the comptroller includes the chief clerk or his or her designee.

(d) To award a contract to which this section applies, the chief clerk shall chair and conduct a public meeting to make the contract award.

(e) The chief clerk shall determine the time and location for the meeting. The meeting must comply with the applicable provisions of Government Code, Chapter 551, including requirements relating to posting notice of the meeting. Texas Procurement and Support Services shall post notice of the meeting on its website and in the state business daily. The office of the attorney general shall advise the chief clerk and Texas Procurement and Support Services on the applicable provisions of Chapter 551 upon request.

(f) Before the open meeting, the chief clerk may review any written recommendations for the proposed contract award submitted by the staff of Texas Procurement and Support Services or by an evaluation committee established by Texas Procurement and Support Services for the proposed contract. The chief clerk may discuss and review these written recommendations for proposed contract award with the staff or evaluation committee prior to the open meeting and may request that additional or clarifying written information be obtained for presentation in the public meeting. The chief clerk shall make the staff's or committee's final written recommendations available to the public at the meeting.

(g) A contract awarded by the chief clerk under this section is not considered final and does not bind the state until all negotiations are completed, if applicable, and all parties to the contract have signed the final contract.

(h) Texas Procurement and Support Services shall post notice of a contract award made in an open meeting under this section on its website and in the state business daily.

(i) Texas Procurement and Support Services shall post the text of a contract awarded in an open meeting under this section on its website and in the state business daily, except for information in a contract that is not subject to disclosure under Government Code, Chapter 552. Information that is not subject to disclosure under Chapter 552 shall be referenced in an appendix that generally describes the information without disclosing the specific content of the information.

(j) In making the determination of whether a contract is reasonably expected to have a value of $100,000 over the life of the contract, Texas Procurement and Support Services may review all available information, including available renewals or extensions, pricing or quantity options, purchase requisitions, estimated budgets, legislative appropriations, market research, previous similar contracts, total previous agency purchase orders under a statewide contract and other pertinent information. For open market awards where Texas Procurement and Support Services is requested to evaluate and award a purchase order for an agency or other authorized entity, Texas Procurement and Support Services may consider an agency's expectation of contract value along with other available information.

(k) The emergency standard is a purchase or other contract award for which delay would create a hazard to life, health, safety, welfare, or property or would cause undue additional cost to the state. An agency's or other authorized entity's documentation to support a request for an emergency contract award by Texas Procurement and Support Services is the same documentation as that which would reasonably support an agency's own emergency purchase.

§20.384. Protests.

(a) The following words and terms, when used in this section, shall have the following meaning unless the context clearly indicates otherwise.

(1) Comptroller's office--The Office of the Comptroller of Public Accounts, an agency of the state.

(2) Chief clerk--deputy comptroller of the comptroller's office.

(3) Director--director of Texas Procurement and Support Services of the comptroller's office.

(4) General counsel--general counsel of the comptroller's office.

(5) Interested parties--All vendors who have submitted bids, proposals or other expressions of interest for the provision of goods or services pursuant to a contract with Texas Procurement and Support Services of the comptroller's office.

(6) Using agency--A state agency, governmental entity or other entity involved in the contract.

(b) Any actual or prospective bidder, offeror, or contractor who considers himself to have been aggrieved in connection with the solicitation, evaluation, or award of a contract by Texas Procurement and Support Services may formally protest to the director of Texas Procurement and Support Services. Such protests must be made in writing and received by the director of Texas Procurement and Support Services within 10 working days after the protesting party knows, or should have known, of the occurrence of the action that is protested. Formal protests must conform to the requirements of subsections (b) and (d) of this section, and shall be resolved through use of the procedures that are described in subsections (e) - (i) of this section. The protesting party must mail or deliver copies of the protest to the using agency and other interested parties.

(c) In the event of a timely protest under this section, the state shall not proceed further with the solicitation or award of the contract unless the chief clerk, after consultation with the director of Texas Procurement and Support Services and the using agency, makes a written determination that the contract must be awarded without delay, to protect the best interests of the state.

(d) A formal protest must be sworn and contain:

(1) a specific identification of the statutory or regulatory provision that the protesting party alleges has been violated;

(2) a specific description of each action by Texas Procurement and Support Services that the protesting party alleges to be a violation of the statutory or regulatory provision that the protesting party has identified pursuant to paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) a statement of any issues of law or fact that the protesting party contends must be resolved;

(5) a statement of the argument and authorities that the protesting party offers in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to the using agency and all other identifiable interested parties.

(e) The director of Texas Procurement and Support Services may settle and resolve the dispute over the solicitation or award of a contract at any time before the matter is submitted on appeal to the general counsel. The director of Texas Procurement and Support Services may solicit written responses to the protest from other interested parties.

(f) If the protest is not resolved by mutual agreement, the director of Texas Procurement and Support Services shall issue a written determination that resolves the protest.

(1) If the director of Texas Procurement and Support Services determines that no violation of statutory or regulatory provisions has occurred, then the director of Texas Procurement and Support Services shall inform the protesting party, the using agency, and other interested parties by letter that sets forth the reasons for the determination.

(2) If the director of Texas Procurement and Support Services determines that a violation of any statutory or regulatory provisions has occurred in a situation in which a contract has not been awarded, then the director of Texas Procurement and Support Services shall inform the protesting party, the using agency, and other interested parties of that determination by letter that details the reasons for the determination and the appropriate remedy.

(3) If the director of Texas Procurement and Support Services determines that a violation of any statutory or regulatory provisions has occurred in a situation in which a contract has been awarded, then the director of Texas Procurement and Support Services shall inform the protesting party, the using agency, and other interested parties of that determination by letter that details the reasons for the determination. This letter may include an order that declares the contract void.

(g) The protesting party may appeal a determination of a protest by the director of Texas Procurement and Support Services to the general counsel. An appeal of the director's determination must be in writing and received in the office of the general counsel by not later than 10 working days after the date on which the director has sent written notice of his determination. The scope of the appeal shall be limited to review of the director's determination. The protesting party must mail or deliver to the using agency and all other interested parties a copy of the appeal, which must contain a certified statement that such copies have been provided.

(h) The general counsel may refer the matter to the chief clerk for consideration or may issue a written decision that resolves the protest.

(i) The following requirements shall apply to a protest that the general counsel refers to the chief clerk.

(1) The general counsel shall deliver copies of the appeal and any responses by interested parties to the chief clerk.

(2) The chief clerk may consider any documents that agency staff or interested parties have submitted.

(3) The chief clerk shall issue a written letter of determination of the appeal to the parties which shall be final. In a subsequent open meeting conducted by the chief clerk under §20.383 of this title (relating to Open Meetings for Certain Contract Awards), the chief clerk shall inform the Statewide Procurement Advisory Council of any such recent determinations by the chief clerk on any contract awards made in any open meeting attended by the council.

(4) A protest or appeal that is not filed timely shall not be considered unless good cause for delay is shown or the chief clerk determines that an appeal raises issues that are significant to agency procurement practices or procedures in general.

(5) A written decision that either the chief clerk or the general counsel has issued shall be the final administrative action of the comptroller's office.

(j) Texas Procurement and Support Services shall maintain all documentation on the purchasing process that is the subject of a protest or appeal in accordance with the retention schedule of Texas Procurement and Support Services.

§20.385. Negotiation and Mediation of Contract Disputes.

The negotiation and mediation of breach of contract claims asserted by contractors against Texas Procurement and Support Services shall be governed by Chapter 1, Subchapter F of this title (relating to Negotiation and Mediation of Contract Disputes).

§20.386. Statewide Procurement Advisory Council.

(a) Purpose. The Statewide Procurement Advisory Council is established under Government Code, §2155.087. The purpose of the council is to make recommendations to and advise the chief clerk in open meetings conducted by the chief clerk under §20.383 of this title (relating to Open Meetings for Certain Contract Awards), to make certain contract awards for Texas Procurement and Support Services.

(b) Duties. The Statewide Procurement Advisory Council shall assist and advise the chief clerk in open meetings conducted

under §20.383 of this title. The council shall make recommendations in these open meetings on proposed procurements, recommendations designed to increase the cost savings, efficiency and other benefits to the state of consolidated state procurement through Texas Procurement and Support Services.

(c) Manner of reporting. The Statewide Procurement Advisory Council shall report to the chief clerk in open meetings conducted under §20.383 of this title.

(d) Duration. The Statewide Procurement Advisory Council is abolished on September 1, 2011, unless Government Code, §2155.087, establishing the council, or similar legislation, is otherwise continued by the 82nd Legislature, 2011.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2007.

TRD-200703523
Martin Cherry
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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SUBCHAPTER H. PURCHASE METHODS

34 TAC §20.391

The Comptroller of Public Accounts adopts new §20.391, concerning request for offers purchase method, with changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4189).

This new section is adopted under Texas Administrative Code, Title 34, Part 1, new Chapter 20: Texas Procurement and Support Services (previously named State Procurement and Program Support Services Office), Subchapter H: Purchase Methods, and relates to the functions and responsibilities of Texas Procurement and Support Services, pursuant to House Bill 3560, 80th Legislature, 2007. House Bill 3560 is effective September 1, 2007. This new section is also proposed pursuant to House Bill 2918, 80th Legislature, 2007. House Bill 2918 is effective September 1, 2007.

House Bill 3560, transfers to the comptroller certain powers and duties of the Texas Building and Procurement Commission that do not primarily concern state facilities. Government Code, §2151.003(2) and §2151.004(d), transfer certain powers and duties of the Texas Building and Procurement Commission to the comptroller. Government Code, §2155.0011, transfers powers and duties under Chapter 2155, Government Code, to the comptroller and authorizes the comptroller to adopt rules to efficiently and effectively administer Government Code, Chapter 2155. Government Code, §2155.0012, requires the comptroller to conduct a public hearing before adopting those rules. Government Code, §2157.0011, transfers powers and duties under Government Code, Chapter 2157, to the comptroller and authorizes the comptroller to adopt rules to efficiently and effectively administer Government Code, Chapter 2157. Government Code, §2157.0012, requires the comptroller to conduct a public hearing before adopting those rules. Government Code, §2157.003, requires the commission, and therefore the comptroller due to the transfer of powers and duties, and state agencies to consider certain best value factors in determining the lowest overall cost for a purchase or lease of an automated information system.

House Bill 2918, amends certain provisions of the Government Code relating to state information technology procurement practices. Under that bill, amended Government Code, §2157.006, requires the Texas Building and Procurement Commission to adopt rules for designating best value purchasing methods for the state, including a request for offers method, under Government Code, §2157.006(c); since these duties and powers of the commission under Chapter 2157 were transferred to the comptroller, the comptroller is required to adopt these rules to designate best value purchase methods, including a request for offer method. Under that bill, the catalog purchase method is repealed.

Comments on proposed posting requirements of request for offers under §20.391(a) and (e) were received from the Texas Building and Procurement Commission, the State Agency Coordinating Committee, the Department of Information Resources, the Texas Department of Transportation, the Texas Water Development Board, the Public Utility Commission and the State Library and Archives Commission. The Texas Building and Procurement Commission and the State Agency Coordinating Committee expressed concern that requiring posting of request for offers on the electronic state business daily regardless of dollar amount would unduly burden agencies making small purchases. The committee requested clear timelines established for posting request for offers and the impact on credit card purchases, as well as dollar threshold requirements for the request for offers purchase method. The Department of Information Resources expressed concern that the posting requirements might have the effect of delaying acquisition of IT commodity items that are not available under that department's commodity contract program. The Texas Department of Transportation commented that it anticipated a significant operational impact to the proposed rule as currently written because it would require additional personnel and recommended that the rules be modified to agree with the current posting limit. The Texas Water Development Board commented that the requirement for posting regardless of dollar value should be deleted. The Texas State Library and Archives Commission communicated with the Department of Information Resources and shared its concerns over the staff hardship and possible delay by the posting requirement. The Texas Public Utility Commission commented that it did not see the usefulness of posting small dollar awards.

When proposing the rules, the agency believed that the number of individual agency procurements for automated information systems that both did not exceed $25,000 and were still not available under the department's commodity contract program would be relatively small and infrequent. If so, the posting requirement, one definitive method of meeting the open and competitive requirement of a request for offers, should not have added an additional administrative burden. The request for offers method in these rules is clearly intended as an open and competitive method. Based on comments received in response to the proposed rules, however, the number of individual procurements in this dollar range that are still not available under the department's commodity contract program may be quite numerous for some agencies and new mandatory posting requirements for these procurements could represent an administrative burden. To address these comments, the rules were amended to elim-

inate any additional posting requirements for request for offers other than as provided in Government Code, §2155.083. While compliance with Government Code, §2155.083, is not mandatory for procurements that do not exceed $25,000, the agency believes that a procuring entity may certainly elect to issue and publish an open and competitive solicitation for $25,000 or less, such as a request for offers, by posting the solicitation on the electronic state business daily. In response to these and other comments summarized elsewhere in this adoption order, however, the rules are clarified to designate other existing purchase methods, including less formal methods, that may achieve best value, particularly for these $25,000 or less procurements for which a procuring entity elects not to post on the electronic state business daily under Government Code, §2155.083. As to less formal methods, guidelines for use of informal quotes or information solicitations up to and including $25,000 rather than the request for offers method will be included in revisions to the statewide Procurement Manual published by Texas Procurement and Support Services.

Comments on proposed §20.391(a) were also received from the Texas Department of Transportation and the State Agency Coordinating Committee. The department recommended that the rule be clarified to indicate how agencies can identify commodities to be procured as automated information systems. The Texas Building and Procurement Commission currently uses the National Institute of Government Purchasing, Inc. (NIGP) Codes to identify which goods and services qualify as information systems. Texas Procurement and Support Services will work with the Department of Information Resources to clarify how agencies can identify which NIGP codes are information technology commodities or automated information systems. The committee expressed similar concerns about use of the NIGP codes and also whether a procuring entity would make the determination as to whether a vendor is qualified. The rules are clarified to address the identification through NIGP codes and that the procuring entity makes the determination as to qualifications.

Comments on proposed §20.391(a) were also received from the Department of Information Resources and the Texas Water Development Board. The department commented that the rule did not include any reference to the requirement that a state agency first comply with the IT commodity contract program and department rules before using a request for offers method. The department suggested that §20.391(a) be modified to refer to the request for offers method as one for the purchase of automated information systems that are not available under the department's IT commodity purchasing program. The proposed rule does refer to the various statutes that govern use of the request for offers method. Also, the request for offers method may be used in three instances under applicable law, not just when items are not available under the department's IT commodity purchasing program, and rather than clarify the rule to list just one, all three should be listed: (1) unavailability under the department's IT commodity purchasing program; (2) an exemption provided by the department of the Legislative Budget Board; and (3) and another exemption, such as an express statutory exemption. The Texas Water Development Board requested clarification on an agency's exemption as provided in Government Code, §2156.068(i). To address these comments, the rule is clarified to include all three instances in which a request for offers method may be used, including the exemptions.

Comments on proposed §20.391(a) were also received from the Department of Information Resources, the Texas Building and Procurement Commission, the State Agency Coordinating Committee and the Texas Water Development Board. They commented that the rule appeared to eliminate the range of purchasing methods available for state agencies to acquire automated information systems that are not available under the department's IT commodity contract program or qualify for an exemption. The Department of Information Resources and the committee offered identical language to authorize Texas Procurement and Support Services, other state agencies or local governments to elect the request for offers purchase method or other purchase methods authorized by Government Code, Title 10, Subtitle D, that will obtain best value for the state. The board recommended that the rule clarify that the other statutory methods are also available and requested clarity as to other existing purchasing procedures, such as purchasing from people with disabilities. Under Government Code, §2157.006(c), the comptroller must designate by rule these purchasing methods for automated information systems. Although the primary method for such purchasing is the request for offers method, it is possible that other existing purchase methods may result in best value in some instances. The rule is clarified to recognize and designate, as required by Government Code, §2157.06(c), other purchase methods authorized by Government Code, Title 10, Subtitle D, that may obtain the best value. In using such methods, the procuring entity shall follow the guidelines of Texas Procurement and Support Services as published in the statewide Procurement Manual. This recognition and designation should ensure availability of less formal purchasing methods for items $25,000 or less, while alleviating any concerns about inadvertent revision to existing procedures to determine availability through existing priority methods such as purchasing from people with disabilities. The statewide Procurement Manual will also emphasize these points to eliminate these concerns.

Comments on proposed §20.391(c) were also received from the Department of Information Resources, the State Agency Coordinating Committee and the Texas Water Development Board. In summary, they inquired as to delegation or review by the comptroller or commented that the rule did not specifically address whether the comptroller intends to exercise a review function over the request for offers process. Although a procuring entity shall comply with the guidelines in the Procurement Manual when using this method, a procuring entity's use of the request for offers method does not require or involve delegation of authority or prior approval by Texas Procurement and Support Services. The rule is amended to make this clarification.

Comments on proposed §20.391(d) were received from the Texas Building and Procurement Commission and the Texas Department of Transportation. The commission expressed concern that the proposed rule might discourage vendors from registering on the centralized master bidders list and lead them to believe they would still receive request for offers from the Department of Information Resources despite not being registered. The commission recommended that language be added to clarify that the Department of Information Resources and other state agencies would continue to send solicitations only to registered vendors but that vendors are not required to be registered to respond to an advertised solicitation. The Texas Department of Transportation expressed concerns that inadvertently exempting qualified vendors from the centralized master bidders list would have several negative impacts, including a decrease in the number of historically underutilized businesses registered on the list. In response to these comments, the comptroller notes that the proposed rule is intended to simply reflect that agencies or other procuring entities may negotiate

offers in response to request for offers with any qualified vendors as provided in House Bill 2918; however, the agency certainly doesn't intend to discourage any vendors from registering for the centralized master bidders list, create any inadvertent exemption from registering, decrease the number of historically underutilized businesses on the list or confuse vendors with regard to receipt of notices of solicitations. To address these comments, clarifying language was added to the rule.

References to the State Procurement and Support Services Office in the rules as published in the *Texas Register* on July 6, 2007, have been revised in the adopted text to read Texas Procurement and Support Services, with conforming changes throughout.

The comptroller conducted a public hearing on August 8, 2007, to receive comments on these rules prior to submission of this adoption order.

This new section is adopted under Government Code, §§2151.003, 2151.004, 2155.0011, 2155.0012, 2157.003, 2157.006, 2157.0011, and 2157.0012, which authorize the comptroller to adopt rules to efficiently and effectively administer these provisions.

This new section implements Government Code, §§2155.003, 2151.004, 2155.0011, 2155.0012, 2157.003, 2157.006, 2157.0011, and 2157.0012.

§20.391. Request for Offers Purchase Method.

(a) This section designates the request for offers purchase method for automated information systems that are not available under the department of information IT commodity purchasing program authorized in Government Code, §2157.068, or for which an agency has an exemption or obtained an exemption as provided in Government Code, §2157.068(i), for use by Texas Procurement and Support Services, other state agencies or local governments as provided in Government Code, §§2157.003, 2157.006(a)(2), 2157.006(b), and 2157.068(i). The request for offers purchase method in this section supersedes the catalog purchase method repealed by House Bill 2918, 80th Legislature, 2007. While the request for offers purchase method is intended as the designated, primary purchasing method for procuring automated information systems other than under the department's IT commodity program and obtaining best value, Texas Procurement and Support Services, other state agencies or local governments may choose to use the request for offers purchase method described herein or any other purchase method authorized by Government Code, Title 10, Subtitle D, that will obtain the best value. In using such other methods to procure such automated information systems, the procuring entity shall follow the guidelines of Texas Procurement and Support Services as published in the statewide Procurement Manual. Texas Procurement and Support Services will work with the Department of Information Resources to clarify how agencies can identify which NIGP codes are information technology commodities or automated information systems. Texas Procurement and Support Services will post such information on its website.

(b) As provided in Government Code, §2157.006(a)(2) and §2157.068(i), Texas Procurement and Support Services and other state agencies shall use the request for offers purchase method under this section. As provided in Government Code, §2157.006(b), local governments may use the request for offers purchase method under this section. In procuring under this method, procuring entities shall use the best value factors as provided in Government Code, §2157.003.

(c) The request for offers method is a direct purchase or lease method used after the procuring entity's evaluation of written offers received in response to an open and competitive solicitation in accordance with the solicitation to result in best value. Under this request for offers method, Texas Procurement and Support Services, other state agencies or local governments shall solicit, evaluate, select, negotiate as appropriate, and contract directly with one or more qualified vendors in accordance with the open and competitive solicitation. In procuring under this request for offers method, the procuring entity shall also comply with the Request for Offers guidelines in the State of Texas Procurement Manual or similar statewide publication of Texas Procurement and Support Services; however, the procuring entity's use of this request for offers method does not require or involve delegation of authority or prior approval by Texas Procurement and Support Services.

(d) Qualified vendors are those that meet the minimum requirements of the request for offers and are qualified, as determined by the procuring entity, to provide the automated information system goods or services solicited. For this purpose, qualified vendors do not have to be listed on the centralized master bidders list or maintain any type of online catalog to qualify or respond to a solicitation that has been advertised on the electronic state business daily; however, qualified vendors are strongly encouraged to maintain current registrations on the centralized master bidders list in order to receive notices of issuance of solicitations sent to those registered.

(e) To initiate this request for offers method, Texas Procurement and Support Services, other state agencies or local governments shall issue a written, open and competitive request for offers. The procuring entity shall comply with Government Code, §2155.083. If Texas Procurement and Support Services, other agencies or local governments believe that the solicited goods or services may be proprietary to one vendor under Government Code, §2155.067, that procuring entity shall include the following statement in the request for offers: "The issuing office believes that the requested items in this request for offers may be proprietary to one vendor under Government Code, §2155.067; however, the issuing office strongly encourages offers from all qualified respondents that may be able to provide the requested items." The procuring entity shall include this statement in bold and prominent type at the beginning of the request for offers.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2007.

TRD-200703524
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: September 1, 2007
Proposal publication date: July 6, 2007
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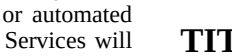

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 48. COMMUNITY CARE FOR AGED AND DISABLED

SUBCHAPTER H. ELIGIBILITY

40 TAC §48.2906

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts an amendment to §48.2906 in Chapter 48, Community Care for Aged and Disabled (CCAD), with changes to the proposed text published in the April 13, 2007, issue of the *Texas Register* (32 TexReg 2130).

The amendment is adopted to implement an age requirement for CCAD primary home care services (in-home unskilled attendant care for individuals who have a medical need for specific tasks, as provided under Title XIX of the Social Security Act). Although DADS previously offered primary home care services to persons of all ages, in response to the settlement agreement in *Alberto N., et al, vs. Albert Hawkins and James Hine*, HHSC will now offer personal care services (unskilled attendant care) to persons younger than 21 years of age. Upon implementation of HHSC's new personal care services program on September 1, 2007, DADS will make its CCAD primary home care services available only to persons who are 21 years of age or older. To provide continuity of care for individuals who would age out of HHSC's personal care services program within six months after the new program begins, the amendment allows a current consumer of CCAD primary home care services who is eligible for Texas Health Steps and who becomes 21 years of age during the six-month period, to continue receiving CCAD primary home care services.

DADS received no comments regarding adoption of the amendment. However, DADS changed subsection (a)(3) to allow a current CCAD primary home care services consumer to remain eligible for CCAD primary home care services if the consumer is eligible for Texas Health Steps and becomes 21 years of age "on or before February 29, 2008." This change was made to provide a specific cut-off date for the exception to the age requirement and to reflect HHSC's decision to provide a six-month, rather than a three-month, transition period for current consumers of CCAD primary home care services who would age out of HHSC's personal care services program soon after it began.

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

§48.2906. Age.

(a) A person must be 18 years of age or older, or an emancipated minor, to receive Community Care for the Aged and Disabled (CCAD) services, except:

(1) a person of any age may receive CCAD Medicaid-funded day activity and health services;

(2) a person of any age who is not eligible for the Texas Health Steps program may receive CCAD Medicaid-funded community attendant services; and

(3) a person must be 21 years of age or older to receive CCAD primary home care services, except a current CCAD primary home care services consumer who is eligible for Texas Health Steps and who becomes 21 years of age on or before February 29, 2008.

(b) A person under 21 years of age who is eligible for the Texas Health Steps program may be eligible for personal care services provided through the Texas Health and Human Services Commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2007.

TRD-200703471
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: September 1, 2007
Proposal publication date: April 13, 2007
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PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

SUBCHAPTER C. ELIGIBILITY FOR CHILD PROTECTIVE SERVICES

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§700.308 - 700.311, 700.314 - 700.321, 700.323 - 700.325, 700.327 - 700.333, and 700.345; the repeal of §700.322 and §700.334; and new §700.346, in its Child Protective Services Chapter. New §700.346 is adopted with a change to the proposed text published in the May 11, 2007, issue of the *Texas Register* (32 TexReg 2618). The amendments to §§700.308 - 700.311, 700.314 - 700.321, 700.323 - 700.325, 700.327 - 700.333, and 700.345, and the repeal of §700.322 and §700.334 are adopted without changes to the proposed text and will not be republished.

The justification for the amendments, repeals and new section is to: (1) allow youth who have aged-out of foster care to return to a DFPS-paid foster care placement to complete their educational goals; (2) ensure that the rules for foster care assistance are consistent with applicable legal requirements, including provisions of the state plan for Medical Assistance and the Texas Family Code; and (3) update the agency name and make minor editorial changes.

Section 700.316 is revised to allow youth who have aged-out of foster care to return to a DFPS-paid foster care placement to complete their educational goals. The return to care category is added as a population that is eligible for foster care assistance; the eligibility requirements for return to care are clarified; and the type of foster care assistance for return to care is listed. The revisions also make the terminology consistent with other provisions of Subchapter C, Eligibility for Child Protective Services; clarify the general eligibility for IV-E or state-paid foster care assistance; and consolidate various provisions related to Medical Assistance Only (MAO). Section 700.322 and §700.334 are deleted and relevant information is incorporated into §700.316.

Section 700.320 is revised to clarify that eligibility in medical facility placement is limited to MAO, update the agency name, make the terminology consistent with the rest of Subchapter C, and clarify the type of proceedings referenced by this rule.

Section 700.333 is revised to make the references to MAO uniform.

New §700.346 lists the criteria that a youth must meet to return to a foster care setting.

The following sections are revised to update the agency name, delete unnecessary language and obsolete provisions, update terminology, and make other minor clarifications: §§700.308 - 700.311, 700.314, 700.315, 700.317 - 700.319, 700.321, 700.323 - 700.325, 700.327 - 700.332, and 700.345.

The sections will function by ensuring that youth who have aged out of foster care will be able to return to an environment where they can obtain self-sufficiency through furthering their education. It will also decrease truancy, dropout rates, and associated risk behaviors.

No comments were received regarding adoption of the sections. DFPS is adding the phrase "including the voluntary agreement to return to care" to §700.346(c) for clarification.

40 TAC §§700.308 - 700.311, 700.314 - 700.321, 700.323 - 700.325, 700.327 - 700.333, 700.345, 700.346

The amendments and new section are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement the Texas Family Code, §264.101 and §264.121.

§700.346. Return to Foster Care.

(a) Subject to the availability of an appropriate licensed placement, a former foster youth may return to foster care if the following eligibility criteria are met:

(1) The youth was in the managing conservatorship of the Department of Family and Protective Services (DFPS) when the youth:

(A) Turned 18 years old; or

(B) Ran away from foster care;

(2) The youth is between the ages of

(A) 18 and 21 years old and is;

(i) Enrolled or to be enrolled within 30 days of placement in a technical or vocational program;

(ii) Enrolled or to be enrolled within 30 days of placement in high-school or in a course of instruction to prepare for the high school equivalency examination; or

(iii) Returning on a break from college or a technical or vocational program for at least one month but no more than four months; or

(B) 18 and 22 years old and enrolled in and attending full time a high school or a program leading toward a high school diploma;

(3) The youth does not have a:

(A) Felony conviction of an offense under Title 5, Title 6, Chapter 29 of Title 7, Chapter 43 or §42.072 of Title 9, §15.031 of Title 4, or §38.17 of Title 8 of the Texas Penal Code (TPC), or any like offense under the law of another state or federal law; or

(B) A finding of physical or sexual abuse of a child in this state or any other state; and

(4) The youth signs a voluntary agreement to return to care.

(b) At the sole discretion of DFPS, a youth may be precluded from returning to foster care if the youth has a:

(1) Misdemeanor or felony conviction under the TPC or the Texas Controlled Substances Act, or any like offense under the law of another state or federal law; or

(2) Finding of abuse or neglect of a child in this state or any other state.

(c) Continuing eligibility for any youth is contingent upon compliance with all requirements, including the voluntary agreement to return to care. No benefits are available past the month the youth turns 21 years old unless the requirements of subsection (a)(2)(B) of this section are met, but in no event may benefits be paid under this provision past the month in which a youth turns 22 years old.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2007.

TRD-200703424
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: September 1, 2007
Proposal publication date: May 11, 2007
For further information, please call: (512) 438-3437

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40 TAC §700.322, §700.334

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement the Texas Family Code, §264.101 and §264.121.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
General Counsel
Department of Family and Protective Services
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SUBCHAPTER E. INTAKE, INVESTIGATION, AND ASSESSMENT

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), the repeal of §700.505 and new §700.505, without changes to the proposed text published in the May 11, 2007, issue of the *Texas Register* (32 TexReg 2624).

The 79th Legislature, Regular Session, in Senate Bill 6, revised the Texas Family Code, §261.301 and §261.3015. The revisions to §261.301 placed in statute the priorities for investigations, which were previously in rule. It also reduced the response time for Priority II reports from 10 days to 72 hours. The revisions to §261.3015(a) and (a-1) clarified that DFPS should screen out less serious cases of abuse or neglect in an effort to focus staff efforts on the more serious cases that require a full investigation. Newly adopted §700.505 is a rewrite of the previous rule regarding priority reports of abuse and neglect and response times. The primary change is reducing the response time for Priority II reports from 10 days to 72 hours. CPS is responding within the 72- hour time frame by either initiating an investigation or, pursuant to Texas Family Code, §261.3015, by forwarding the report to specialized screening staff.

The adopted new §700.505 will function by reducing the DFPS response time for Priority II reports from 10 days to 72 hours, which will increase child safety.

No comments were received regarding adoption of the sections.

40 TAC §700.505

The repeal is adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements Texas Family Code, §261.301 and §261.3015, as amended by the 79th Legislature, Regular Session.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
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For further information, please call: (512) 438-3437

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40 TAC §700.505

The new section is adopted under Human Resources Code (HRC), §40.0505 and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The newly adopted section implements Texas Family Code, §261.301 and §261.3015, as amended by the 79th Legislature, Regular Session.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: September 1, 2007
Proposal publication date: May 11, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER H. ADOPTION ASSISTANCE PROGRAM

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), the repeal of §700.801; new §700.801; and amendments to §§700.802 - 700.805, 700.820 - 700.823, 700.840, 700.841, 700.844 - 700.846, 700.850, 700.860, 700.880, and 700.881, without changes to the proposed text published in the May 11, 2007, issue of the *Texas Register* (32 TexReg 2625).

The original impetus for the changes is a provision in the Deficit Reduction Act (DRA) of 2005, P.L. 109-171, §7404. That provision alters the requirements governing eligibility determinations for adoption assistance benefits funded by Title IV-E of the Social Security Act. Specifically, the section provides that in cases in which IV-E eligibility is predicated upon eligibility for the Aid to Families with Dependent Children program (AFDC), the AFDC eligibility determination should no longer be made for both the month of removal and in the month the petition to adopt is filed. Rather, the AFDC eligibility determination should be made only for the month of removal. In addition to the changes necessitated by DRA, DFPS is making changes to Subchapter H, Adop-

tion Assistance Program, so it is easier to understand and more consistent.

Section 700.801 is deleted and adopted as new. The definitions are alphabetized for easier access. With the exceptions noted below, the definitions are the same except for minor clarifications. The definition of "adoptive placement" is modified to better explain the time period and the requirements for an adoptive placement. The definition of "special needs child" and a cross reference to the relevant rule are added to eliminate confusion. The definition of "nonrecurring expenses" is added for clarification. The agency name and terminology are updated.

Section 700.802 is revised to eliminate superfluous language that is either contained in the rule or moved to another rule.

Section 700.803 clarifies the process used to determine Title IV-E and state-paid eligibility. The agency name and terminology are also updated.

Section 700.804 clarifies the meaning of the special needs definition for children who belong to certain racial and ethnic groups; describes acceptable types of proof of "reasonable efforts" to place a child without adoption assistance; and clarifies that in exceptional circumstances DFPS may deem an adoptive placement; however, the adoptive parents have the burden of proof. The agency name is also updated.

Section 700.805 clarifies the burden of proof for eligibility in cases involving children placed for adoption by a Licensed Child Placing Agency or other authorized entity.

Section 700.820 makes minor language revisions and adds reference to a rule for clarification purposes.

Section 700.821 clarifies that a determination by the SSA must be prior to the finalization of the adoption. In order to comply with the Deficit Reduction Act of 2005, the rule specifies that the child's eligibility for AFDC need only be determined in the month in which the court proceedings that resulted in the order removing the child began and not also in the month the petition to adopt is filed.

Section 700.822 is revised to comply with the Deficit Reduction Act of 2005. The rule specifies that the child's eligibility for AFDC need only be determined in the month in which the court proceedings that resulted in the order removing the child began and not also in the month the petition to adopt is filed. The subsections are renumbered in accordance with the deletion, and the question is made consistent with the answer.

Section 700.844 is revised to add the payment ceilings and delete the out-of-date process for establishing adoption assistance rates.

Section 700.845 makes minor stylistic revisions.

Section 700.846 adds an explanation of circumstances in which DFPS may grant retroactive benefits in an adoption assistance application. Authority for such a retroactive grant exists in current rule; however, the rule change will offer additional specifics regarding the possible grant of retroactive benefits. The rule also clarifies that adoption assistance benefits may begin prior to consummation of the adoption.

Section 700.881 makes minor stylistic revisions.

Sections 700.823, 700.840, 700.841, 700.850, 700.860, and 700.880 update the agency name and make minor revisions.

The sections will function by ensuring that the rules governing eligibility for adoption assistance will be easier to understand and consistent with corresponding federal provisions. Eligibility for this program is of great importance to many families in Texas so it is important that the requirements are explained as clearly as possible, and that the burden of proof for establishing eligibility, particularly in the context of fair hearings, is fully described.

During the comment period, DFPS received a comment from Lutheran Social Services of the South, Inc. concerning §700.804. The commenter stated that the definition of special needs should be modified, so that the required reasonable efforts to place a child without adoption assistance would include situations in which foster parents wish to adopt a child. DFPS is adopting the section without change because a preexisting relationship with foster parents is already taken into account by the reference to "best interests" in the rule.

DIVISION 1. PROGRAM DESCRIPTION AND DEFINITIONS

40 TAC §700.801

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements the Texas Family Code, §162.302 and §162.304.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
General Counsel
Department of Family and Protective Services
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For further information, please call: (512) 438-3437

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40 TAC §§700.801 - 700.805

The amendments and new section are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement the Texas Family Code, §162.302 and §162.304.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2007.

TRD-200703418
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: September 1, 2007
Proposal publication date: May 11, 2007
For further information, please call: (512) 438-3437

♦ ♦ ♦

DIVISION 2. TITLE IV-E ELIGIBILITY REQUIREMENTS

40 TAC §§700.820 - 700.823

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement the Texas Family Code, §162.302 and §162.304.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2007.

TRD-200703419
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: September 1, 2007
Proposal publication date: May 11, 2007
For further information, please call: (512) 438-3437

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DIVISION 3. APPLICATION PROCESS, AGREEMENTS, AND BENEFITS

40 TAC §§700.840, 700.841, 700.844 - 700.846, 700.850

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement the Texas Family Code, §162.302 and §162.304.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2007.

TRD-200703420
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: September 1, 2007
Proposal publication date: May 11, 2007
For further information, please call: (512) 438-3437

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DIVISION 4. CHANGES IN CIRCUMSTANCES

40 TAC §700.860

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements the Texas Family Code, §162.302 and §162.304.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2007.

TRD-200703421
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: September 1, 2007
Proposal publication date: May 11, 2007
For further information, please call: (512) 438-3437

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DIVISION 5. APPEALS AND HEARINGS

40 TAC §700.880, §700.881

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC

§40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement the Texas Family Code, §162.302 and §162.304.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2007.

TRD-200703422
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: September 1, 2007
Proposal publication date: May 11, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER P. PREPARATION FOR ADULT LIVING
DIVISION 2. EDUCATION AND TRAINING VOUCHER PROGRAM

40 TAC §700.1615

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), an amendment to §700.1615, without changes to the proposed text published in the May 11, 2007, issue of the *Texas Register* (32 TexReg 2630).

The justification for the amendment is to allow youths who are age 16 and up and are exempt from compulsory high-school attendance to receive financial assistance to pay the costs of attendance for a technical or vocational program.

The amendment will function by ensuring that youth reaching adult age and transitioning from the foster care system will be better prepared with adequate job skills resulting in a smoother transition into adulthood and independent living.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements 42 U.S.C. §677(a)(6)(i).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2007.

TRD-200703423
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: September 1, 2007
Proposal publication date: May 11, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER W. LEVEL-OF-CARE SERVICE SYSTEM
DIVISION 5. INTENSIVE PSYCHIATRIC TRANSITION PROGRAM

40 TAC §§700.2381, 700.2383, 700.2385

The Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Family and Protective Services (DFPS), new §§700.2381, 700.2383, and 700.2385, without changes to the proposed text published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 2972).

DFPS received funding in House Bill 1 in the 80th session for an exceptional item that was part of the department's Legislative Appropriations Request (LAR) to implement a time limited, post-hospitalization "step-down" rate to support the transition of children in DFPS conservatorship who have experienced or are likely to experience multiple inpatient admissions in a psychiatric hospital to an appropriate placement. HHSC is concurrently adopting an amendment to the Texas Administrative Code, Title 1 §355.7103, Rate-Setting Methodology for 24-Hour Residential Child Care Reimbursements to accommodate this new program.

The new sections will implement the Intensive Psychiatric Transition program. Section 700.2381 provides an overview of the Intensive Psychiatric Transition program, which provides a short-term placement option as an alternative to psychiatric hospitalization or after release from a psychiatric hospital. Section 700.2383 establishes the eligibility criteria for the program, which require that a child (1) be in DFPS conservatorship for the last 90 days; (2) have had three psychiatric hospitalizations in the last 12 months; and (3) be ready for discharge from a psychiatric hospital or at risk of a fourth hospitalization. Section 700.2385 establishes the limit for placement in this program, which is 60 days with a possible extension for an additional 60 days.

The new sections will function by making a psychiatric transition program available for children with extreme behaviors and histories of multiple inpatient psychiatric care episodes to assist them in transitioning into less restrictive placements.

No comments were received regarding adoption of the rules.

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement House Bill 1, 80th Session.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2007.

TRD-200703475

Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: September 1, 2007
Proposal publication date: June 29, 2007
For further information, please call: (512) 438-3437

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Higher Education Coordinating Board

Title 19, Part 1

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 1, concerning Agency Administration. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-200703477
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: August 9, 2007

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 4, concerning Rules Applying to All Public Institutions of Higher Education in Texas. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-200703478
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: August 9, 2007

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 5, concerning Rules Applying to Public Universities and/or Health-Related Institutions of Higher Education in Texas. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-200703479
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: August 9, 2007

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 6, concerning Health Education, Training, and Research Funds. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-200703480
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: August 9, 2007

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 13, concerning Financial Planning. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-200703481
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: August 9, 2007

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 14, concerning Research Funding Programs. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-200703482
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: August 9, 2007

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure 1: 30 TAC Chapter 113--Preamble

40 CFR Part 63 Subpart (Chapter 113 Section)	Section Title	Original Incorporation (Commission Adoption)
A (§113.100)	General Provisions	June 15, 2004
B (§113.105)	Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Section 112(j)	May 30, 2003
C (§113.106)	List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List	November 29, 2004
F (§113.110)	Synthetic Organic Chemical Manufacturing Industry	June 23, 2003
G (§113.120)	Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater	June 23, 2003
L (§113.170)	Coke Oven Batteries	June 23, 2003
M (§113.180)	Perchloroethylene Dry Cleaning Facilities	June 23, 2003
N (§113.190)	Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks	July 19, 2004
O (§113.200)	Ethylene Oxide Emissions Standards for Sterilization Facilities	June 23, 2003
Q (§113.220)	Industrial Process Cooling Towers	June 23, 2003
R (§113.230)	Gasoline Distribution Facilities	December 19, 2003
S (§113.240)	Pulp and Paper Industry	June 23, 2003
T (§113.250)	Halogenated Solvent Cleaning	June 23, 2003
U (§113.260)	Group I Polymers and Resins	June 23, 2003
W (§113.280)	Epoxy Resins Production and Non-Nylon Polyamides Production	June 23, 2003
Y (§113.300)	Marine Vessel Loading	June 23, 2003
AA (§113.320)	Phosphoric Acid Manufacturing Plants	June 23, 2003
BB (§113.330)	Phosphate Fertilizers Production Plants	June 23, 2003
DD (§113.350)	Off-Site Waste and Recovery Operations	June 23, 2003
GG (§113.380)	Aerospace Manufacturing and Rework Facilities	June 23, 2003
HH (§113.390)	Oil and Natural Gas Production Facilities	June 23, 2003
II (§113.400)	Shipbuilding and Ship Repair (Surface Coating)	June 23, 2003
KK (§113.420)	Printing and Publishing	June 23, 2003
LL (§113.430)	Primary Aluminum Reduction Plants	June 23, 2003
MM (§113.440)	Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills	May 6, 2004
SS (§113.500)	Closed Vent Systems, Control Devices, Recovery Devices, and Routing to a Fuel Gas System or a Process	July 12, 2002
XX (§113.550)	Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations	July 12, 2002
YY (§113.560)	Generic Maximum Achievable Control Technology Standards	February 10, 2003
CCC (§113.600)	Steel Pickling - HCl Process Facilities and Hydrochloric Acid Regeneration Plants	June 23, 2003
EEE (§113.620)	Hazardous Waste Combustors	June 23, 2003
GGG (§113.640)	Pharmaceuticals Production	June 23, 2003

40 CFR Part 63 Subpart (Chapter 113 Section)	Section Title	Original Incorporation (Commission Adoption)
HHH (§113.650)	Natural Gas Transmission and Storage Facilities	June 23, 2003
JJJ (§113.670)	Group IV Polymers and Resins	June 2, 2004
LLL (§113.690)	Portland Cement Manufacturing Industry	June 23, 2003
MMM (§113.700)	Pesticide Active Ingredient Production	June 23, 2003
NNN (§113.710)	Wool Fiberglass Manufacturing	June 23, 2003
OOO (§113.720)	Manufacture of Amino/Phenolic Resins	June 23, 2003
PPP (§113.730)	Polyether Polyols Production	June 23, 2003 and July 1, 2004
QQQ (§113.740)	Primary Copper Smelting	June 12, 2002
RRR (§113.750)	Secondary Aluminum Production	June 23, 2003
TTT (§113.770)	Primary Lead Smelting	June 23, 2003
UUU (§113.780)	Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units	April 11, 2002
XXX (§113.810)	Ferroalloys Production: Ferromanganese and Silicomanganese	June 23, 2003
AAAA (§113.840)	Municipal Solid Waste Landfills	January 16, 2003
CCCC (§113.860)	Manufacturing of Nutritional Yeast	May 21, 2001
EEEE (§113.880)	Organic Liquids Distribution (Non-Gasoline)	February 3, 2004
FFFF (§113.890)	Miscellaneous Organic Chemical Manufacturing	November 10, 2003
GGGG (§113.900)	Solvent Extraction for Vegetable Oil Production	April 5, 2002
HHHH (§113.910)	Wet-Formed Fiberglass Mat Production	April 11, 2002
IIII (§113.920)	Surface Coating of Automobiles and Light-Duty Trucks	April 26, 2004
JJJJ (§113.930)	Paper and Other Web Coating	December 4, 2002
KKKK (§113.940)	Surface Coating of Metal Cans	November 13, 2003
MMMM (§113.960)	Surface Coating of Miscellaneous Metal Parts and Products	April 26, 2004
NNNN (§113.970)	Surface Coating of Large Appliances	July 23, 2002
OOOO (§113.980)	Printing, Coating, and Dyeing of Fabrics and Other Textiles	May 29, 2003
PPPP (§113.990)	Surface Coating of Plastic Parts and Products	April 26, 2004
QQQQ (§113.1000)	Surface Coating of Wood Building Products	May 28, 2003
RRRR (§113.1010)	Surface Coating of Metal Furniture	May 23, 2003
TTTT (§113.1030)	Leather Finishing Operations	February 27, 2002
UUUU (§113.1040)	Cellulose Products Manufacturing	June 11, 2002
WWWW (§113.1060)	Reinforced Plastic Composites Production	April 21, 2003
XXXX (§113.1070)	Rubber Tire Manufacturing	March 12, 2003
YYYY (§113.1080)	Stationary Combustion Turbines	August 18, 2004
ZZZZ (§113.1090)	Stationary Reciprocating Internal Combustion Engines	June 15, 2004
AAAAA (§113.1100)	Lime Manufacturing Plants	January 5, 2004
BBBBB (§113.1110)	Semiconductor Manufacturing	May 22, 2003
CCCCC (§113.1120)	Coke Ovens: Pushing, Quenching, and Battery Stacks	April 22, 2003
EEEEE (§113.1140)	Iron and Steel Foundries	April 22, 2004
FFFFF (§113.1150)	Integrated Iron and Steel Manufacturing Facilities	May 20, 2003

40 CFR Part 63 Subpart (Chapter 113 Section)	Section Title	Original Incorporation (Commission Adoption)
GGGGG (§113.1160)	Site Remediation	October 8, 2003
HHHHH (§113.1170)	Miscellaneous Coating Manufacturing	December 11, 2003 and December 29, 2003
IIIII (§113.1180)	Mercury Emissions from Mercury Cell Chlor-Alkali Plants	December 19, 2003
JJJJJ (§113.1190)	Brick and Structural Clay Products Manufacturing	May 16, 2003 and May 28, 2003
KKKKK (§113.1200)	Clay Ceramics Manufacturing	May 16, 2003 and May 28, 2003
LLLLL (§113.1210)	Asphalt Processing and Asphalt Roofing Manufacturing	May 7, 2003
MMMMM (§113.1220)	Flexible Polyurethane Foam Fabrication Operations	April 14, 2003
NNNNN (§113.1230)	Hydrochloric Acid Production	April 17, 2003
PPPPP (§113.1250)	Engine Test Cells/Stands	August 28, 2003
QQQQQ (§113.1260)	Friction Materials Manufacturing Facilities	October 18, 2002
RRRRR (§113.1270)	Taconite Iron Ore Processing	October 30, 2003
SSSSS (§113.1280)	Refractory Products Manufacturing	April 16, 2003
TTTTT (§113.1290)	Primary Magnesium Refining	October 10, 2003

Figure 2: 30 TAC Chapter 113--Preamble

40 CFR Part 63 Subpart (Chapter 113 Section)	Section Title
DDDD (§113.870)	Plywood and Composite Wood Products
DDDDD (§113.1130)	Industrial, Commercial, and Institutional Boilers and Process Heaters
DDDDDD (§113.1390)	Polyvinyl Chloride and Copolymers Production Area Sources
EEEEEE (§113.1400)	Primary Copper Smelting Area Sources
FFFFFF (§113.1410)	Secondary Copper Smelting Area Sources
GGGGGG (§113.1420)	Primary Nonferrous Metals Area Sources - Zinc, Cadmium, and Beryllium

Figure: 37 TAC §9.32

TEXAS DEPARTMENT OF PUBLIC SAFETY

SILVER ALERT REQUEST FORM

Fax (512) 424-2281 or (512) 451-2291; and Call (512) 424-2277 or 2208

MAXIMUM ACTIVATION - 24 HOURS

Reporting Agency Information

Name of Reporting Agency

Name/Title of Investigating Officer

Contact number for Investigating Officer

Fax number for reporting agency

Authentication password

	YES	NO
1. Is the missing person 65 years of age or older?	☐	☐
2. Is the senior citizen's domicile in Texas?	☐	☐
3. Does the senior citizen have a diagnosed impaired mental condition, and does the senior citizen's disappearance pose a credible threat to the senior citizen's health and safety? (Law enforcement shall require the family or legal guardian of the missing senior citizen to provide documentation from a medical or mental health professional of the senior citizen's condition.)	☐	☐
4. Is the Silver Alert request within 72 hours of the senior citizen's disappearance?	☐	☐
5. Is there sufficient information available to disseminate to the public that could assist in locating the senior citizen? (Highway signs will be activated only if accurate vehicle information is available AND it is confirmed that the senior citizen was driving the vehicle at the time of the disappearance.)	☐	☐

❖ **IMPORTANT:** Agencies are responsible for accurately answering the above questions. The Department of Public Safety will verify circumstances of each request to ensure criteria have been met. Do **NOT** send SILVER ALERT request if the answer is **NO** to **ANY** of these questions. **If activated, your request is only valid for a period of 24 hours.** You will be contacted after 12 hours, 18 hours, and 23 hours in which you may decide to request an extension. Any extension must be requested prior to or during the 23 hour reminder from the State Operations Center. Contact (512) 424-2277 or 2208 for all extension requests.

Date of last contact: _____ Time: _____

Last known location: _____

VICTIM DATA

Name: _____ Diagnosed Mental Condition: _____

Age: _____ Weight: _____ Height: _____ Sex: _____ Eyes: _____

DOB: _____ Hair: _____ Clothing: _____

Unique Physical Characteristic _____

VEHICLE DATA

Make: _____ Model: _____ Year: _____ Color: _____

LP-State: _____ Number: _____

Any other descriptors: _____

SA_1

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Department of Assistive and Rehabilitative Services

Correction of Error

The Department of Assistive and Rehabilitative Services adopted new 40 TAC §101.113 in the August 3, 2007, issue of the *Texas Register* (32 TexReg 4766).

The preamble erroneously stated that the rule was adopted without changes; however, §101.113 was adopted with changes to correct the omission of a word from the proposed rule submission. The text of §101.113 should have been republished with the addition of the word "been" in subsection (c). The corrected subsection reads as follows:

(c) Employment with the Department will be denied when an applicant's criminal history contains a felony criminal conviction which has been determined by the Commissioner or Assistant Commissioner to make the applicant unfit or unsafe to perform the functions of the job.

TRD-200703643

♦ ♦ ♦

Texas Cancer Council

Texans Conquer Cancer Patient Support Services Program

Request for Applications

Introduction:

The Texas Cancer Council (TCC) announces the availability of state funds to be awarded to support the *Texans Conquer Cancer Patient Support Services Program*. The TCC awards grants to organizations that provide support services to cancer patients and their families. Funding for these grants is derived from the sale of "Texans Conquer Cancer" specialty license plates through the Texas Department of Transportation.

Funds will be awarded to the selected organizations in the maximum amount of $2,000 per organization per fiscal year. Applicants may apply again in future funding years.

Purpose:

The purpose of this Request for Applications (RFA) is to solicit statewide applications for projects that will provide direct support services to cancer patients and their families.

Eligibility requirements:

Only nonprofit organizations located in Texas that provide support services for cancer patients and their families are eligible for funding under this program. Funds may be used to provide the following allowable services, which include but are not limited to:

A) Transportation

B) Childcare

C) Medical equipment

D) Consumable supplies for cancer care

E) Lodging for patients and/or family during active treatment

F) Medications and equipment required for symptom control

G) Rent assistance during active treatment

H) Food assistance during active treatment

Funds may not be used to provide the following disallowable services, which include but are not limited to:

A) Hospitalization

B) Surgery

C) Outpatient care, including laboratory tests and physician visits

D) Chemotherapy

E) Radiation

F) Health insurance deductibles

Operating expenses for grantee such as utilities, salaries, office equipment, and entertainment are also not allowed.

Application requirements:

Applications and instructions for completing the application can be obtained from TCC by calling (512) 438-3075, or on-line at the TCC website at www.tcc.state.tx.us/tccfund.html. Applications are due at the TCC office by 5 p.m. on October 8, 2007. Applications must be submitted according to the Patient Support Services application instructions and form. The application may be expanded to a maximum of two pages, however, please provide only the requested information.

Project requirements:

Projects funded under this initiative must provide:

* Support services for cancer patients and their families.

* Documentation of previous successful experience in providing effective patient support services.

* Assurances that the project does not duplicate existing services or resources in the community.

* Documentation of an in-kind contribution of at least ten percent. In-kind contributions may include applicant funds committed to the project, donated services, indirect expenses, or other in-kind contributions. The Council reserves the right to waive this requirement, on a case-by-case basis.

* A process for collecting performance data and providing an annual report that describes the number of people served and the services provided.

Funding awards:

Applications will be reviewed by the Texans Conquer Cancer Advisory Committee and TCC staff for completeness and technical merit. The Texas Cancer Council is expected to make final funding decisions in late October 2007. All applicants will receive written notification of the Council's decisions regarding their applications.

The Council's funding decision will be based on:

* The scope of the project, including reaching a maximum number of people;

* Innovative aspects of the proposed project;

* Applicant's successful collaboration with other relevant organizations;

* Applicant's qualifications to conduct the proposed project;

* Reasonableness of budgeted amounts and appropriateness of budget justifications;

* Completeness and clarity of the application; and

* Applicant's ability to reach patients in greatest need.

The Texas Cancer Council has sole discretion and reserves the right to reject any or all applications received in response to this funding announcement. This announcement does not constitute a commitment by the Council to award a contract or to pay costs incurred in the preparation of an application.

It is anticipated that up to five (5) projects will be selected under this initiative to receive *Texans Conquer Cancer Patient Support Services Program* funding. The *Program* may fund more, or fewer projects, based on the merit of applications received and the availability of funding. The Council reserves the right to take the needs of geographic locations into consideration when selecting projects.

Additional information:

For additional information about this funding announcement, contact Sandra Balderrama, Executive Director, or Michelle Frerich (mfrerich@tcc.state.tx.us), Program Specialist, Texas Cancer Council, P.O. Box 12097, Austin, Texas 78711, (512) 463-3190.

TRD-200703618
Sandra Balderrama
Executive Director
Texas Cancer Council
Filed: August 15, 2007

♦ ♦ ♦

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of August 3, 2007, through August 9, 2007. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on August 15, 2007. The public comment period for this project will close at 5:00 p.m. on September 14, 2007.

FEDERAL AGENCY ACTIONS:

Applicant: Brazos River Harbor Navigation District; Location: The project is located at the west end of the Brazos Harbor on the southeast side of the City of Freeport, Brazoria County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Freeport, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 271650; Northing: 3203216. Project Description: The applicant proposes to provide additional cargo unloading and ship berthing areas in the Brazos Harbor in Freeport. The project components that would affect potential waters of the U.S. include the construction of Transit Shed 6, the wharf extension, the enlargement of the Brazos Harbor, and the construction of the truck scale.

The applicant proposes to place fill into a total of 0.06 acre of potential waters of the U.S. This includes permanent fill in 0.02 acre (1,078 square feet) of the Brazos Harbor and a maximum of 0.04 acre (1,840 square feet) of wetlands in a roadside drainage ditch that would be relocated. In addition to the proposed fill, the applicant proposes to conduct a dredging operation within 3.3 acres of the Brazos Harbor, excavate 2.74 acres of upland area to enlarge the harbor. Overall, the project would result in a net increase of 2.71 acres of waters of the U.S. due to the enlargement of the Brazos Harbor.

The Project components that would affect waters of the U.S. include the construction of Transit Shed 6, the wharf extension, the enlargement of the Brazos Harbor, and the construction of the truck scale. The following paragraphs summarize the project components, identifies which components would affect waters of the U.S., and lists the exhibits that illustrate each component.

1) Transit Shed 6: The proposed Transit Shed 6, a 112,640 square-foot cold-storage facility, would extend 440 feet along the Brazos Harbor and 256 feet inland. In order to construct the transit shed adjacent to the proposed wharf, 1,078 square feet (0.02 acre) of the Brazos Harbor (below the Mean High Water elevation of +1.16 feet NAVD 88) would be filled with 275 cubic yards of suitable earthen fill.

2) Parking and Receiving Area: The proposed project includes the construction of 6.38 acres of concrete/paved parking and receiving area on the west side of the proposed transit shed for access and egress of truck and other operational traffic around the proposed transit shed. The parking and receiving area would require filling approximately 128 linear feet (640 square feet) of roadside drainage ditch that contains herbaceous wetlands.

3) Truck Yard and Container Storage: The proposed project includes the construction of 4.53 acres of concrete/paved truck yard and container storage area for the storage of refrigerated and other wheeled trailers, as well as limited container storage. The yard would be located at the south end of the property and would be constructed at an elevation of +9 feet. The truck yard and container storage would not affect wetlands or other waters of the U.S.

4) Truck Scale: A truck scale would be constructed along the north side of an existing paved access road located along the south end of the project area. The scale may require the relocation of a maximum of 240 linear feet (1,200 square feet) of an existing drainage ditch that contains herbaceous wetlands.

5) Wharf Extension: An existing wharf at Berth 5 that was constructed under U.S. Army Corps of Engineers (Corps) Permit 21740 (January 31, 2000) would be extended 325 feet to the south to provide working space for incoming ships along the proposed transit shed. The proposed wharf extension would be 100 feet wide and match the cross-section of the existing wharf. It would be a concrete-pile supported structure with a sheet pile bulkhead. The top of the wharf would be at an elevation of +13.2 feet (NAVD 88). The extension of the wharf would require the discharge of a total of 2,800 cubic yards of concrete/steel and would cover a total surface area of 0.45 acre of existing waters of the U.S.

6) Enlargement of the Brazos Harbor: To provide for navigation and access to the proposed transit shed and wharf extension, the applicant

proposes to dredge/excavate in and adjacent to the southwest corner of the Brazos Harbor. Dredging would occur within 3.3 acres of the existing harbor (below annual high tide elevation), with 120,000 cubic yards being dredged from existing waters. In addition, adjacent and landward of the annual high tide, 133,000 cubic yards of materials would be excavated from an area of 2.74 acres, thereby enlarging the Brazos Harbor by 2.74 acres. The harbor would be dredged to an elevation of -37.5 feet (NAVD 88) with a 1-foot advance maintenance cut to -38.5 feet, and it would have 3:1 slopes. Both mechanical and hydraulic dredging would be used to enlarge the harbor. Mechanically dredged materials would be used on-site to construct project components. Any excess material from the mechanical dredging portion of the project would be placed in existing Dredge Material Placement Area (DMPA) No. 8; a 16-acre placement area located south of the project area. DMPA No. 8 is owned by the Port of Freeport and has been previously permitted and used for dredged material placement. Hydraulically dredged materials would be pumped offsite to an existing placement area that is owned by Port Freeport and has been previously permitted and is currently used by the Corps for maintenance dredging in the Freeport Harbor. The DMPA is 310 acres in size and provides sufficient capacity for both the Federal maintenance project and the applicant's proposed project. Containment levees and a weir structure for effluent discharge already exist in the placement area. No maintenance dredging is proposed for this project.

7) Relocation of Storm Protection Levee: The applicant proposes to relocate approximately 950 linear feet of an existing Velasco Drainage District storm protection levee to allow for the proposed enlargement of the Brazos Harbor. The levee would have a 6:1 front slope and a 4:1 back slope and would require approximately 38,000 cubic yards of material for reconstruction. This project component would not affect waters of the U.S. CCC Project No.: 07-0263-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-768 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Falcon Point Ranch Master Community, Inc.; Location: The project is located in San Antonio Bay, at the Bay Club at Falcon Point Ranch, near Seadrift, Calhoun County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Seadrift, Texas. Approximate UTM Coordinates for the Center Pier in NAD 27 (meters): Zone 14; Easting: 725484; Northing: 3141134. Project Description: The applicant, Falcon Point Ranch Master Community, Inc., wishes to construct three piers from their property into San Antonio Bay to provide recreation for future residents of the Bay Club at Falcon Point Ranch. The project area consists of approximately 0.20 acre. CCC Project No.: 07-0265-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-334 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Davis Petroleum Corporation; Location: The project is located in Galveston Bay State Tract (ST) 130 Well #1 and ST 98, Galveston Bay, Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Bacliff, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 316419; Northing: 3276777. Project Description: The applicant requests authorization to drill ST 130 Well No. 1 located at X=3,303,850 and Y=667,921 State Plane Texas Coordinate Systems, South Central Zone (NAD 27). This permit is to also include the installation and maintenance of a well platform, production platform, and flowline from well to production platform. A sales pipeline up to 6 inches in diameter would be installed from said production platform in a northeasterly direction approximately 10,672 feet to a Calpine Platform in ST 98 (Department of the Army Permit SWG-04-12-047). A well pad measuring 240- by 100- by 3-feet would also be constructed requiring the placement of approximately 2,667 cubic yards of shell, gravel or crushed rock. The Calpine Platform is located at X=3,309,791 and Y=676,787. CCC Project No.: 07-0266-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-407 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200703601
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: August 14, 2007

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Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period July 2007, as required by Tax Code, §202.058, is $58.35 per barrel for the three-month period beginning on April 1, 2007, and ending June 30, 2007. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of July 2007, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period July 2007, as required by Tax Code, §201.059, is $5.82 per mcf for the three-month period beginning on April 1, 2007, and ending June 30, 2007. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of July 2007, from a qualified Low-Producing Well, is not eligible for exemption from the natural gas production tax imposed by Tax Code, Chapter 201.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-200703594
Martin Cherry
General Counsel
Comptroller of Public Accounts
Filed: August 14, 2007

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Notice of Contract Amendment

The Comptroller of Public Accounts (Comptroller) announces this notice of amendment of a contract with Westwood Management Corp., 300 Crescent Court, Suite 1300, Dallas, Texas 75201, for domestic large capitalization core value equity investment management services to the Texas Prepaid Higher Education Tuition Board under RFP No. 149b.

The original notice of request for proposals (RFP #149b) was published in the November 1, 2002, issue of the *Texas Register* (27 TexReg 10469). The Notice of Award was published in the March 28, 2003, issue of the *Texas Register* (28 TexReg 2755).

This amendment extends the term of the contract through August 31, 2008.

TRD-200703525
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: August 10, 2007

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Notice of Contract Amendment

The Comptroller of Public Accounts (Comptroller) announces this notice of amendment of a contract with Clark, Thomas & Winters, P.C., 300 West Sixth Street, 15th Floor, Austin, Texas 78701, to provide outside counsel services to the Texas Prepaid Higher Education Tuition Board under RFP No. 155c.

The original notice of request for proposals (RFP #155c) was published in the April 25, 2003, issue of the *Texas Register* (28 TexReg 3618). The Notice of Award was published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10310).

The amendment extends the term of the contract through August 31, 2008.

TRD-200703526
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: August 10, 2007

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/20/07 - 08/26/07 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/20/07 - 08/26/07 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200703591
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 14, 2007

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 24, 2007**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 24, 2007**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Aqua Development, Inc.; DOCKET NUMBER: 2007-0823-MWD-E; IDENTIFIER: RN102343217; LOCATION: Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 Texas Administrative Code (TAC) §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013433001, Interim Effluent Limitations and Monitoring Requirements Numbers 1, 2, and 6 for Outfall 001B, and the Code, §26.121(a), by failing to comply with the permitted effluent limits; PENALTY: $5,960; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Aqua Development, Inc.; DOCKET NUMBER: 2007-0726-MWD-E; IDENTIFIER: RN102344082; LOCATION: Fort Bend County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014194001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a), by failing to comply with the permitted effluent limits; PENALTY: $2,910; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Aqua Development, Inc. dba Aqua Texas, Inc.; DOCKET NUMBER: 2007-0657-MWD-E; IDENTIFIER: RN102343662; LOCATION: Denton County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014186001, Interim II Effluent Limitations and Monitoring Requirements Number 1, and

the Code, §26.121(a), by failing to comply with the permitted effluent limits; and 30 TAC §305.125(17) and TPDES Permit Number WQ0014186001, Monitoring and Reporting Requirements Number 1, by failing to submit complete discharge monitoring report data; PENALTY: $2,574; ENFORCEMENT COORDINATOR: Heather Brister, (512) 239-1203; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Aqua Development, Inc. dba Aqua Texas, Inc.; DOCKET NUMBER: 2007-0704-MWD-E; IDENTIFIER: RN102342227; LOCATION: Montgomery County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 14007001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permit limits; and 30 TAC §305.125(1) and TPDES Permit Number 14007001, Monitoring and Reporting Requirements Number 1, by failing to submit parameter data for pH daily minimum and maximum and flow daily average and daily maximum values; PENALTY: $4,712; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Burleson County MUD 1; DOCKET NUMBER: 2007-0818-PWS-E; IDENTIFIER: RN101397131; LOCATION: Burleson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and Texas Health & Safety Code (THSC), §341.0315(c), by failing to comply with the maximum contaminant level for total trihalomethanes; PENALTY: $850; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(6) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2007-0567-MLM-E; IDENTIFIER: RN102495884; LOCATION: Borger, Hutchinson County, Texas; TYPE OF FACILITY: petroleum refining and natural gas processing plant; RULE VIOLATED: 30 TAC §335.4 and the Code, §26.121(a)(1), by failing to prevent the unauthorized discharge of industrial waste; 30 TAC §101.20(3) and §116.715(a), Flexible Permit Number 9868A and PSD-TX-102M6, Special Condition 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(b)(1) and THSC, §382.085(b), by failing to include the names of all affected facilities on the emissions event report; PENALTY: $65,832; Supplemental Environmental Project (SEP) offset amount of $32,916 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(7) COMPANY: George Ted DeVries dba DeVries Dairy; DOCKET NUMBER: 2007-0849-AGR-E; IDENTIFIER: RN100802917; LOCATION: Erath County, Texas; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.36(c) (formerly 30 TAC §321.40(1)) and TPDES Permit Number 03061, Section IV., General Description and Location of Waste Disposal Systems, by failing to maintain and manage control facilities to retain all contaminated rainfall runoff from open lots and associated areas; and 30 TAC §321.42(p) (formerly 30 TAC §321.49(i)) and TPDES Permit Number 03061, Standard Provisions, Paragraph (f), by failing to show reduction in phosphorus concentration; PENALTY: $1,860; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Diamond Shamrock Refining Company, L.P.; DOCKET NUMBER: 2007-0676-AIR-E; IDENTIFIER: RN100210517; LOCATION: Moore County, Texas; TYPE OF FACILITY: petroleum refining plant; RULE VIOLATED: 30 TAC §101.201(a)(2) and (b)(1) and THSC, §382.085(b), by failing to include all facility common names in the initial notification and final emissions event report; 30 TAC §101.20(3) and §116.715(a), Flexible Permit Number 9708/PSD-TX-861M2 Application Representations, Table F-2, and Special Condition 9B, 40 Code of Federal Regulations (CFR) §60.18(c)(2), and THSC, §382.085(b), by failing to prevent unauthorized emissions and to operate a flare; and 30 TAC §101.20(3) and §116.715(a), Flexible Permit Number 9708/PSD-TX-861M2, Application Representations, Table F-2, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $30,826; Supplemental Environmental Project (SEP) offset amount of $12,330 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: City of Edcouch; DOCKET NUMBER: 2007-0764-MSW-E; IDENTIFIER: RN105176218; LOCATION: Edcouch, Hidalgo County, Texas; TYPE OF FACILITY: equipment shop; RULE VIOLATED: 30 TAC §330.15(c) and §330.103(b), by failing to prevent the unauthorized transportation and disposal of municipal solid waste; PENALTY: $900; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(10) COMPANY: F. D. Gavranovic; DOCKET NUMBER: 2007-0617-PST-E; IDENTIFIER: RN102262995; LOCATION: Wharton, Wharton County, Texas; TYPE OF FACILITY: farm; RULE VIOLATED: 30 TAC §334.51(b)(2)(B) and the Code, §26.3475(c)(2), by failing to equip the fill tube of the tank with either an attached spill container or catchment basin, or enclose it in a liquid-tight manway, riser, or sump; 30 TAC §334.51(b)(2)(C) and the Code, §26.3475(c)(2), by failing to equip the diesel tank with proper overfill prevention equipment; 30 TAC §334.49(a) and the Code, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank (UST) system; 30 TAC §334.50(a)(1)(A) and the Code, §26.3475(c)(1), by failing to provide a proper release detection method capable of detecting a release from any portion of the UST system; 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection; and 30 TAC §334.22(a) and the Code, §5.702, by failing to pay outstanding UST fees and associated late fees; PENALTY: $8,500; Supplemental Environmental Project (SEP) offset amount of $3,400 applied to Lower Colorado River Authority's Household Hazardous Waste and Reusable Materials Collection; ENFORCEMENT COORDINATOR: Shontay Wilcher, (512) 239-2136; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: K.A.T. Excavation & Construction Inc.; DOCKET NUMBER: 2007-0925-AIR-E; IDENTIFIER: RN102705191; LOCATION: Sour Lake, Hardin County, Texas; TYPE OF FACILITY: bulk mineral handling operation; RULE VIOLATED: 30 TAC §101.4 and §101.5 and THSC, §382.085(a) and (b), by failing to prevent a nuisance condition, to prevent emissions from impacting off-site properties, and to prevent a traffic hazard along State Highway 105 resulting from dust emissions created by vehicle traffic; PENALTY: $2,175; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(12) COMPANY: Kwik-Kopy Corporation; DOCKET NUMBER: 2007-0890-MWD-E; IDENTIFIER: RN102076494; LOCATION: Harris County, Texas; TYPE OF FACILITY: wastewater treatment;

RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 13059001, Effluent Limitations and Monitoring Requirements Number 1 for Outfall 001, and the Code, §26.121(a), by failing to comply with the permitted effluent limits; PENALTY: $1,270; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(13) COMPANY: Lone Star Beef Processors, L.P.; DOCKET NUMBER: 2007-0757-AIR-E; IDENTIFIER: RN105096309; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: composting site; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(a) and (b), by failing to take necessary measures to prevent the release of odors; and 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain air quality authorization to construct and operate a new facility which emits air contaminants into the air; PENALTY: $4,200; ENFORCEMENT COORDINATOR: Lindsey Jones, (512) 239-4930; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(14) COMPANY: City of Megargel; DOCKET NUMBER: 2007-0130-PWS-E; IDENTIFIER: RN101386605; LOCATION: Megargel, Archer County, Texas; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.111(b)(1)(A)(i), by failing to maintain the turbidity level of the combined filter effluent so as not to exceed one Nephelometric Turbidity Unit (NTU); 30 TAC §290.111(b)(1)(A)(ii), by failing to maintain the turbidity level of the combined filter effluent so as not to exceed 0.3 NTU in at least 95% of the samples tested each month; 30 TAC §290.111(f)(4), by failing to maintain the turbidity level of the combined filter effluent below five NTU; and 30 TAC §290.111(f)(2), by failing to report the results of the individual filter monitoring tests; PENALTY: $2,473; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(15) COMPANY: City of Midway; DOCKET NUMBER: 2007-0318-MWD-E; IDENTIFIER: RN101920262; LOCATION: Madison County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013378001, Effluent Limitations and Monitoring Requirements Numbers 1 and 3 for Outfall 001A, and the Code, §26.121(a), by failing to comply with the permitted effluent limits; and 30 TAC §305.125(1) and TPDES Permit Number WQ0013378001, Effluent Limitations and Monitoring Requirements Number 1 for Outfall 001A, by failing to submit the ammonia nitrogen data on the discharge monitoring report (DMR); PENALTY: $13,398; Supplemental Environmental Project (SEP) offset amount of $10,719 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(16) COMPANY: Presbyterian Mo-Ranch Assembly; DOCKET NUMBER: 2005-0924-MWD-E; IDENTIFIER: RN101528446; LOCATION: Hunt, Kerr County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §312.123 and TPDES Permit Number 10768-001, Reporting Requirements, by failing to submit the annual sludge summary; and 30 TAC §305.65 and the Code, §26.121(a), by failing to renew TPDES Permit Number 10768-001 within 180 days prior to the permit's expiration date; PENALTY: $5,100; Supplemental Environmental Project (SEP) offset amount of $4,080 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(17) COMPANY: Julie Ann Thames dba Primrose Mobile Home Park; DOCKET NUMBER: 2007-0731-WQ-E; IDENTIFIER: RN101228005; LOCATION: Johnson County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: the Code, §26.121(a), by failing to prevent the unauthorized discharge of sewage; PENALTY: $6,500; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: Shell Pipeline Company LP; DOCKET NUMBER: 2007-0620-AIR-E; IDENTIFIER: RN100219716; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: tank farm; RULE VIOLATED: 30 TAC §122.143(4), Federal Operating Permit (FOP) Number O-2739, General Terms and Conditions (GTC), Special Terms and Conditions 3.A.(iv)1, and THSC, §382.085(b), by failing to conduct quarterly opacity readings; and 30 TAC §§122.143(4), 122.145(2)(A) and (B), and 122.146(5)(D), FOP Number O-2739, GTC, and THSC, §382.085(b), by failing to submit a semi-annual deviation report; PENALTY: $7,735; Supplemental Environmental Project (SEP) offset amount of $3,094 applied to South East Texas Regional Planning Commission-West Port Arthur Home Energy Efficiency Program; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(19) COMPANY: Shin-Etsu Silicones of America, Inc.; DOCKET NUMBER: 2007-0675-IWD-E; IDENTIFIER: RN100885102; LOCATION: Freeport, Brazoria County, Texas; TYPE OF FACILITY: industrial organic chemicals; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 04362 Effluent Limitations, and the Code, §26.121(a), by failing to comply with permit effluent limits; PENALTY: $10,650; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: St. Mary's University; DOCKET NUMBER: 2007-1236-PST-E; IDENTIFIER: RN100650027; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ delivery certificate prior to receiving fuel; PENALTY: $875; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(21) COMPANY: Stone Mill Homes, Inc.; DOCKET NUMBER: 2007-0783-WQ-E; IDENTIFIER: RN105206015; LOCATION: Southlake, Denton County, Texas; TYPE OF FACILITY: residential housing construction project; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; and 30 TAC §205.6 and the Code, §5.702, by failing to pay general permits storm water fees; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: Texas Department of Criminal Justice; DOCKET NUMBER: 2007-0716-MWD-E; IDENTIFIER: RN102816873; LOCATION: Huntsville, Madison County, Texas; TYPE OF FACILITY: wastewater system; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11176001, Effluent Limitations and Monitoring Requirements Number 1 for Outfall 001A, and the Code, §26.121(a), by failing to comply with the permit effluent limits; PENALTY: $3,660; Supplemental Environmental Project (SEP) offset amount of $2,928 applied to Texas Association of Resource Conservation and

Development Areas, Inc. ("RC&D") - Abandoned Tire Clean-Up; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(23) COMPANY: Texas Department of Criminal Justice; DOCKET NUMBER: 2007-0786-MWD-E; IDENTIFIER: RN102320322 and RN102314671; LOCATION: Fort Bend County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Numbers WQ0011475001 and WQ0011475003, Effluent Limitations and Monitoring Requirements Numbers 2 and 6, and the Code, §26.121(a), by failing to comply with the permitted effluent limits for facilities 1 and 2; and 30 TAC §305.125(1), TPDES Permit Number WQ0011475001, Monitoring and Reporting Requirements Number 1 for Outfall 001A, by failing to submit the parameter data on the DMR; PENALTY: $14,365; Supplemental Environmental Project (SEP) offset amount of $11,492 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Abandoned Tire Clean-Up; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Jason E. Weaver; DOCKET NUMBER: 2007-0745-LII-E; IDENTIFIER: RN103255634; LOCATION: Sugar Land, Fort Bend County, Texas; TYPE OF FACILITY: landscape irrigation business; RULE VIOLATED: 30 TAC §344.70, by failing to comply with the City of Sugar Land's landscape irrigation inspection requirements, ordinances, or regulations; and 30 TAC §344.61(a), by failing to have the licensed irrigator sign their legal name on each professional document and to affix the imprint of the seal or rubber stamp facsimile of the seal over the signature; PENALTY: $401; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: Zucker Enterprises, Inc. dba Sparkle Cleaners; DOCKET NUMBER: 2006-0823-DCL-E; IDENTIFIER: RN104957873 and RN104962618; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: dry cleaning drop stations; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration forms; PENALTY: $1,778; ENFORCEMENT COORDINATOR: Shontay Wilcher, (512) 239-2136; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

TRD-200703592
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 14, 2007

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Enforcement Orders

An agreed order was entered regarding Amin Business, Inc., Docket No. 2003-1010-PST-E on July 31, 2007 assessing $4,280 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rafael Padilla dba Ralphs Auto Service, Docket No. 2004-1416-PST-E on July 31, 2007 assessing $9,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jacquelyn Boutwell, Staff Attorney at (512) 239-5846, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sherwin Alumina, L.P., Docket No. 2004-1982-AIR-E on July 31, 2007 assessing $20,488 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Salim Aziz Dossani dba Short Trip Food Mart, Docket No. 2005-0365-PST-E on July 31, 2007 assessing $16,585 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mark Curnutt, Staff Attorney at (512) 239-0624, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jesus Sanchez Acosta, Docket No. 2005-0543-MSW-E on July 31, 2007 assessing $4,200 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Penelope, Docket No. 2005-0549-MWD-E on July 31, 2007 assessing $7,000 in administrative penalties with $1,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Sandy VanCleave, Enforcement Coordinator at (512) 239-2670, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding David Priess and Randy Priess, Docket No. 2005-0700-MLM-E on July 31, 2007 assessing $25,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mark Curnutt, Staff Attorney at (512) 239-0624, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Electra, Docket No. 2005-0795-MWD-E on July 31, 2007 assessing $8,360 in administrative penalties with $1,672 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Robert McAdams dba MCs Country Store & Café, Docket No. 2005-1850-PST-E on July 31, 2007 assessing $10,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mark Curnutt, Staff Attorney at (512) 239-0624, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Winston Construction, Inc., Docket No. 2006-0110-EAQ-E on July 31, 2007 assessing $3,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding J.C. Conoco, Inc., Docket No. 2006-0216-PST-E on July 31, 2007 assessing $4,095 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EBAA Iron, Inc., Docket No. 2006-0232-AIR-E on July 31, 2007 assessing $30,000 in administrative penalties with $6,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Derek Wasson dba Corner Mart Grocery & Station, Docket No. 2006-0419-PST-E on July 31, 2007 assessing $35,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Iqbal Sadruddin dba Mr. Clean Cleaners, Docket No. 2006-0787-DCL-E on July 31, 2007 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mary Rathmann dba Bastrop Cleaners, Docket No. 2006-0822-DCL-E on July 31, 2007 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at (512) 239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Rodrigo Salas dba Sams Cleaners, Docket No. 2006-0940-DCL-E on July 31, 2007 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary Hammer, Staff Attorney at (512) 239-2496, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sunoco Partners Marketing & Terminals L.P., Docket No. 2006-0942-MLM-E on July 31, 2007 assessing $28,078 in administrative penalties with $5,616 deferred.

Information concerning any aspect of this order may be obtained by contacting Laurie Eaves, Enforcement Coordinator at (512) 239-4495, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Crowell, Docket No. 2006-1101-PWS-E on July 31, 2007 assessing $1,370 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, Staff Attorney at (512) 239-0617, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Hong Nguyen dba Lee Dry Cleaners and dba Lee Dry Cleaners III, Docket No. 2006-1159-DCL-E on July 31, 2007 assessing $2,370 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary Hammer, Staff Attorney at (512) 239-2496, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Equistar Chemicals, LP, Docket No. 2006-1232-AIR-E on July 31, 2007 assessing $96,106 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Aransas Pass, Docket No. 2006-1414-PST-E on July 31, 2007 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hyon Walk dba Chantz Cleaners, Docket No. 2006-1464-DCL-E on July 31, 2007 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Flower Grove Cooperative Gin, Docket No. 2006-1588-IHW-E on July 31, 2007 assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator at (512) 239-0086, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Aledo, Docket No. 2006-1594-MLM-E on July 31, 2007 assessing $9,930 in administrative penalties with $1,986 deferred.

Information concerning any aspect of this order may be obtained by contacting Anita Keese, Enforcement Coordinator at (956) 430-6034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Trans Future Incorporated dba Dry Clean Super Center of Atascocita, Docket No. 2006-1613-DCL-E on July 31, 2007 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sabine Mud-Logging, Inc., Docket No. 2006-1737-MLM-E on July 31, 2007 assessing $5,625 in administrative penalties with $1,125 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Dow Chemical Company, Docket No. 2006-1752-AIR-E on July 31, 2007 assessing $3,406 in administrative penalties with $681 deferred.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SpeeDee Oil Change, Inc., Docket No. 2006-1814-PST-E on July 31, 2007 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at (512) 239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Penreco Partnership, Docket No. 2006-1820-AIR-E on July 31, 2007 assessing $68,586 in administrative penalties with $13,717 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tuan Ngoc Do dba Xpress Mart, Docket No. 2006-1912-PST-E on July 31, 2007 assessing $4,815 in administrative penalties with $963 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Eastman Chemical Company, Docket No. 2006-1923-AIR-E on July 31, 2007 assessing $15,708 in administrative penalties with $3,142 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at (713)422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Equistar Chemicals, LP, Docket No. 2006-1932-AIR-E on July 31, 2007 assessing $28,775 in administrative penalties with $5,755 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hi Five Auto Care, Inc., Docket No. 2006-1938-PST-E on July 31, 2007 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Phillip DeFrancesco, Enforcement Coordinator at (817)588-5833, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding William Bell dba JFK Home Moving, Docket No. 2006-1963-MSW-E on July 31, 2007 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Alison Echlin, Enforcement Coordinator at (512) 239-3308, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dave Fisk, Docket No. 2006-1973-LII-E on July 31, 2007 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of La Joya, Docket No. 2006-1986-PWS-E on July 31, 2007 assessing $924 in administrative penalties with $185 deferred.

Information concerning any aspect of this order may be obtained by contacting Anita Keese, Enforcement Coordinator at (956) 430-6034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Millennium Petrochemicals Inc., Docket No. 2006-1988-AIR-E on July 31, 2007 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Oxy USA WTP, L.P., Docket No. 2006-2008-AIR-E on July 31, 2007 assessing $152,350 in administrative penalties with $30,470 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jalisco, Ltd. dba Fiesta, Docket No. 2006-2012-PST-E on July 31, 2007 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Amtul Enterprises, Inc. dba EZ Way, Docket No. 2006-2013-PST-E on July 31, 2007 assessing $4,000 in administrative penalties with $800 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Alia Enterprises, Inc. dba Shaver 66, Docket No. 2006-2014-PST-E on July 31, 2007 assessing $2,300 in administrative penalties with $460 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Stratford, Docket No. 2006-2023-MSW-E on July 31, 2007 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Southwest Convenience Stores, LLC dba 7-Eleven, Docket No. 2006-2038-AIR-E on July 31, 2007 assessing $18,820 in administrative penalties with $3,764 deferred.

Information concerning any aspect of this order may be obtained by contacting Lindsey Jones, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Corporation, Docket No. 2006-2046-AIR-E on July 31, 2007 assessing $4,575 in administrative penalties with $915 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Insteel Wire Products Company, Docket No. 2006-2058-WQ-E on July 31, 2007 assessing $10,400 in administrative penalties with $2,080 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Total Petrochemicals USA, Inc., Docket No. 2006-2092-AIR-E on July 31, 2007 assessing $21,750 in administrative penalties with $4,350 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding East Business, Inc. dba Shop N Go, Docket No. 2006-2096-PST-E on July 31, 2007 assessing $5,775 in administrative penalties with $1,155 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Perry Lemmons dba American Waste Water, Docket No. 2006-2097-SLG-E on July 31, 2007 assessing $2,100 in administrative penalties with $420 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding USA Five Star Homes, LP, Docket No. 2006-2098-WQ-E on July 31, 2007 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512)239-1482, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Western Extrusions Corporation, Docket No. 2006-2103-AIR-E on July 31, 2007 assessing $17,850 in administrative penalties with $3,570 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hood County Utilities, Inc., Docket No. 2006-2157-MWD-E on July 31, 2007 assessing $17,850 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aziz Chandwani dba Prince Food Mart, Docket No. 2006-2215-PST-E on July 31, 2007 assessing $3,600 in administrative penalties with $720 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Valero Refining-Texas, L.P., Docket No. 2006-2218-AIR-E on July 31, 2007 assessing $75,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Houston Country Club, Docket No. 2006-2219-PST-E on July 31, 2007 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Phillip DeFrancesco, Enforcement Coordinator at (817)588-5833, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Akzo Nobel Polymer Chemicals LLC, Docket No. 2006-2232-AIR-E on July 31, 2007 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding John Goodson dba The Oasis, Docket No. 2006-2235-PST-E on July 31, 2007 assessing $7,650 in administrative penalties with $1,530 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Robinson, Docket No. 2007-0005-WQ-E on July 31, 2007 assessing $7,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding West Harris County Municipal Utility District No. 17, Docket No. 2007-0007-MWD-E on July 31, 2007 assessing $4,050 in administrative penalties with $810 deferred.

Information concerning any aspect of this order may be obtained by contacting J. Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pencco, Inc., Docket No. 2007-0011-MLM-E on July 31, 2007 assessing $7,490 in administrative penalties with $1,498 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Limos, Enforcement Coordinator at (512) 239-5839, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tim O'Brien dba O'Brien's Restaurant, Docket No. 2007-0049-PWS-E on July 31, 2007 assessing $726 in administrative penalties with $145 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hyatt Corporation dba Hyatt Regency Dallas, Docket No. 2007-0060-PST-E on July 31, 2007 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Phillip DeFrancesco, Enforcement Coordinator at (817) 588-5833, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Electra Custom Homes, Inc., Docket No. 2007-0157-WQ-E on July 31, 2007 assessing $800 in administrative penalties with $160 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-1482, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding George West Independent School District, Docket No. 2007-0174-PST-E on July 31, 2007 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Phillip DeFrancesco, Enforcement Coordinator at (817) 588-5833, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Goodyear Tire & Rubber Company, Docket No. 2007-0337-AIR-E on July 31, 2007 assessing $11,856 in administrative penalties with $2,371 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Houston Refining LP, Docket No. 2007-0440-AIR-E on July 31, 2007 assessing $50,453 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361)825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Baptist Saint Anthony's Hospital Corporation, Docket No. 2007-0460-PST-E on July 31, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Marcela Garza, Field Investigator at (512)239-0363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Bohica Investment, Ltd., Docket No. 2007-0461-PST-E on July 31, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Marcela Garza, Field Investigator at (512)239-0363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Fort Bend Independent School District dba PFC Building, Docket No. 2007-0462-PST-E on July 31, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Marcela Garza, Field Investigator at (512) 239-0363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bobbie S. Dodd, Bonnie Mitchell & Bobbie M. Cherry dba Splendora Dry Cleaners, Docket No. 2006-1248-DCL-E on July 31, 2007 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Shamima Sharif dba Super Cleaners, Docket No. 2006-1041-DCL-E on July 31, 2007 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary Hammer, Staff Attorney at (512) 239-2496, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Touche International, Inc., Docket No. 2004-1649-MSW-E on July 13, 2007.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding GB's Self Serve, Inc., Docket No. 2005-1744-PST-E on July 13, 2007 assessing $17,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kent Heath, Enforcement Coordinator at (512) 239-4575, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200703625
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 15, 2007

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Notice of Deletion of the Dorchester Refining Company Site from the State Superfund Registry

The executive director (ED) of the Texas Commission on Environmental Quality (TCEQ) is issuing this notice of deletion of the Dorchester

Refining Company Site (the Site) from its proposed for listing status on the state registry, the list of state Superfund sites. The state registry lists the contaminated sites which may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The Site is being deleted from the state registry because it will be addressed under the agency's Voluntary Cleanup Program.

The Site was originally proposed for listing on the state registry in the May 20, 2005, edition of the *Texas Register* (30 TexReg 3048). The Site is approximately 138 acres and located in the 1700 block of West First Street, in the city of Mount Pleasant, Titus County, Texas. In addition, the Site includes any areas where hazardous substances came to be located as a result, either directly or indirectly, of releases of hazardous substances from the Site.

Dorchester Refining was an active refinery under several owners from 1936 to 1984, refining gasoline, diesel, naptha and asphalt products. Past refining operations at the Site have resulted in impact to soils and sediments. Data collected by the TCEQ as part of the 2003 Hazard Ranking System indicate elevated levels of heavy metals (cadmium, chromium, lead and mercury) and constituents (pyrene, chrysene, benzo(b) - and benzo(k) - fluoranthene, benzo(a)pyrene, indeno(1,2,3-cd)pyrene, and benzo(g,h,i)perlyene) were detected in the soils. Heavy metals (cadmium, chromium, and lead) were also detected in the sediments of nearby Tankersley creek. The elevated levels of metals and semi-volatile organic constituents in soils and sediments are attributable to the former refining operations at the Site.

The Site was accepted into the Voluntary Cleanup Program (VCP) for completion of investigation and remediation activities in accordance with the Texas Risk Reduction Program. Currently, the VCP participants are in the process of securing the Site and addressing health and safety issues before conducting a full site assessment. The VCP participants will conduct an initial assessment of groundwater, soils, and sediments as well as a later more detailed investigation to determine what cleanup levels and remedial actions are needed to complete closure of the Site under the Texas Risk Reduction Program.

In accordance with 30 TAC §335.344(b), the TCEQ held a public meeting to receive comments on the intended deletion of the Site on July 19, 2007, at the Mount Pleasant Junior High School, located at 2801 Old Paris Road, Mount Pleasant, Texas 75455. No comments regarding the proposed deletion were received at the public meeting. The complete public file, including a transcript of the public meeting, may be viewed during regular business hours at the TCEQ Records Management Center, Records Customer Service, Building E, First Floor, 12100 Park 35 Circle, MC-199, Austin, Texas 78753, telephone numbers (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee.

All inquiries regarding the deletion of the Site should be directed to Ms. Crystal Taylor, Community Relations, telephone numbers 800-633-9363, extension 3844.

TRD-200703607
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 14, 2007

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Notice of Deletion of the Former Aluminum Finishing Company Proposed State Superfund Site from the State Superfund Registry

The executive director (ED) of the Texas Commission on Environmental Quality (TCEQ) is issuing this notice of deletion of the Aluminum Finishing Company Site (the Site) from its proposed for listing status on the state registry, the list of state Superfund sites. The state registry lists the contaminated sites which may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The Site is being deleted from the state registry because it will be addressed under the agency's Voluntary Cleanup Program.

The Site was originally proposed for listing on the state registry in the May 19, 2006, edition of the *Texas Register* (31 TexReg 4253). The Site is approximately 0.2 acres located at Ardmore Street, Houston, Harris County, Texas. In addition, the Site included any areas where hazardous substances came to be located as a result, either directly or indirectly, of releases of hazardous substances from the Site.

The facility, formerly known as the Aluminum Finishing Company, is located in a mainly residential area on a corner lot at 6006 Ardmore, Houston, Texas. Metal plating operations were conducted on the Site from March 1981 through June 1993 where nuts and bolts were electroplated with cadmium and coated with chromium. The cleaning solution was sodium cyanide that was neutralized with sulfuric acid. The plating sludge was stored on-site in metal tanks. The substances generated by the electroplating processes on-site include cadmium, chromium, and cyanide. Data collected in February 1992, November 1994, and January 1997, revealed elevated levels of cadmium, chromium, lead, arsenic, and cyanide in on-site soils.

In accordance with 30 TAC §335.344(b), the TCEQ held a public meeting to receive comments on the intended deletion of the Site on July 12, 2007 at the Emancipation Community Center, located at 3018 Dowling, Houston, Texas 77004. Comments which were received into the record were addressed at the public meeting by the TCEQ. The complete public file, including a transcript of the public meeting, may be viewed during regular business hours at the commission's Records Management Center, Building E, First Floor, 12100 Park 35 Circle, Austin, Texas 78753, telephone numbers (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee.

All inquiries regarding the deletion of the Site should be directed to Ms. Crystal Taylor, Community Relations, telephone numbers 800-633-9363 or (512) 239-3844.

TRD-200703608
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 14, 2007

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Notice of District Hearing

Notice issued August 9, 2007.

TCEQ Docket No. 2007-0512-DIS; The Texas Commission on Environmental Quality (TCEQ) will conduct a hearing on an application (the "Application") granting additional powers to Fort Bend County Water Control and Improvement District No. 8 (the "District"). The Application was filed with the TCEQ and includes the District's resolution requesting the authority to dispose of wastewater and control storm water pursuant to Texas Water Code §§51.331 - 51.333. The TCEQ will conduct this hearing under the authority of Texas Water Code Chapters 49 and 51, 30 Texas Administrative Code (TAC) Chapter 293, and the procedural rules of the TCEQ. The TCEQ will conduct

the hearing at: 9:30 a.m., Wednesday, September 19, 2007, Building E, Room 201S, 12100 Park 35 Circle, Austin, Texas.

The District was created by order of the Fort Bend County Commissioners Court on August 9, 2005, and organized under the terms and provisions of Article XVI, Section 59 of the Texas Constitution, and Chapters 49 and 51 of the Texas Water Code. The District contains 53.32 acres of land within Fort Bend County, Texas. Pursuant to 30 TAC §293.15, the resolution filed with the Application states that having the additional authority to provide wastewater and drainage services are in the best interest of the District.

The purpose of this hearing is to provide all interested persons the opportunity to appear and offer testimony for or against the proposal contained in the Application. At the hearing, pursuant to Texas Water Code §51.333, the TCEQ will determine whether the District should be granted the additional authority.

INFORMATION SECTION. For information regarding the date and time this application will be heard before the Commission, please submit written inquiries to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087, or by phone at (512) 239-3300. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team at (512) 239-4691. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al (512) 239-0200. Persons with disabilities who plan to attend this hearing and who need special accommodations at the hearing should call the TCEQ Office of Public Assistance at 1-800-687-4040 or 1-800-RELAY-TX (TDD) at least one week prior to the hearing.

TRD-200703628
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 15, 2007

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Notice of Executive Director's Response to Comments on General Permit Number TXR040000

The executive director of the Texas Commission on Environmental Quality (commission or TCEQ) files this Response to Public Comment (Response) on Texas Pollutant Discharge Elimination System (TPDES) General Permit No. TXR040000. As required by Texas Water Code (TWC), §26.040(d) and 30 Texas Administrative Code (TAC) §205.3(c), before a general permit is issued, the executive director must prepare a response to all timely, relevant and material, or significant comments. The response must be made available to the public and filed with the Office of the Chief Clerk at least ten days before the commission considers the approval of the general permit. This response addresses all timely received public comments, whether or not withdrawn. Timely public comments were received from the following persons:

Cameron County Drainage District No. 3, Cameron County Drainage District No. 5, Galveston County Consolidated Drainage District, Jefferson County, City of Groves, Jefferson County Drainage District No. 7, City of Nederland, City of Port Arthur, and City of Port Neches (Group 1); Texas Cities Coalition on Storm water, City of Longview, and City of Grapevine (TCCOS); Bexar County Environmental Services (BCES), Carroll & Blackman, Inc. (Carroll & Blackman), Carter & Burgess, City of Austin (Austin), City of Bunker Hill Village (Bunker Hill), City of Cedar Hill Public Works Department (Cedar Hill), City of Cleburne (Cleburne), CTS Environmental (CTS), Dallas Area Rapid Transit (DART), Department of the U.S. Army at Fort Hood (Fort Hood), Dyess Airforce Base (DAFB), Dallas/Fort Worth International Airport (DFW), Dodson & Associates, Inc. (Dodson), Environmental Integrated Services, Inc. (EIS), City of Euless (Euless), City of Farmers Branch (Farmers Branch), Freese and Nichols, Inc. (Freese & Nichols), City of Grand Prairie (Grand Prairie), City of Grapevine (Grapevine), Galveston County Health District (GCHD), City of Houston (Houston), Houston Builders Association (HBA), Houston Council of Engineering Companies, Inc. (HCEC), Harris County Flood Control District (HCFCD), Harris County Storm Water Quality Section (Harris County), Lloyd, Gosselink, Blevins, Rochelle, Baldwin & Townsend, P.C. (Lloyd Gosselink), City of Lubbock (Lubbock), Mathews & Freeland, L.L.P. (Mathews & Freeland), City of Missouri City (Missouri City), Russell, Moorman & Rodriguez, L.L.P. (Russell Moorman), National Aeronautics and Space Administration (NASA), North Central Texas Council of Governments (NCTCOG), North Central Texas Regional Storm Water Management Coordinating Council (NCTRSW), Save Our Springs Alliance (SOS), Sunland Group (Sunland), Tarrant County, Texas Association of Counties (TAOC), City of Tyler (Tyler), Texas Department of Criminal Justice (TDCJ), Texas Conference of Urban Counties (TCUC), Texas Department of Transportation (TxDOT), Texas Department of Transportation - Houston District (TxDOT-Houston), Texas Department of Transportation, Lubbock District (TxDOT-Lubbock), Bob Tome (Tome), Travis County, United States Department of the Interior, Fish and Wildlife Service (FWS), City of Universal City (Universal City), and Vinson & Elkins (V&E).

Background

This general permit would authorize discharges of storm water and certain non-storm water discharges from small municipal separate storm sewer systems (MS4s). Federal Phase II storm water regulations adopted by TCEQ extend storm water permitting requirements to small MS4s located in urbanized areas and issuing this permit provides initial coverage for regulated small MS4s. Under the permit, small MS4s will only be authorized to discharge following the development and implementation of a comprehensive storm water management program (SWMP). Each regulated small MS4 operator must develop the six minimum control measures (MCMs) according to the provisions of the permit.

The permit is proposed under the statutory authority of: 1) TWC, §26.121, which makes it unlawful to discharge pollutants into or adjacent to water in the state except as authorized by a rule, permit, or order issued by the commission; 2) TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state; and 3) TWC, §26.040, which provides the commission with authority to amend rules to authorize waste discharges by general permit.

On September 14, 1998, the TCEQ received authority from the United States Environmental Protection Agency (EPA) to administer the Texas Pollutant Discharge Elimination System (TPDES) program. TCEQ and the EPA have a Memorandum of Agreement (MOA) which authorizes the administration of the National Pollutant Discharge Elimination System (NPDES) program by the TCEQ as it applies to the State of Texas.

The federal Phase II storm water regulations were published on December 8, 1999 in the *Federal Register*, requiring regulated small MS4s to obtain permit coverage by March 10, 2003. The Phase II small MS4 regulations are in the federal rules at 40 Code of Federal Regulations (C.F.R.) §§122.30 through 122.37, which were adopted by reference as amended by TCEQ at 30 TAC §281.25(b). TCEQ did not adopt by reference the guidance in 40 C.F.R. §122.33 and §122.34.

Storm water and certain non-storm water discharges from medium and large MS4s, those operated within cities with a population of 100,000 or more, are currently authorized under NPDES individual storm water permits. These permits were issued by EPA according to the federal requirements for Phase I of the NPDES storm water regulations, for terms not to exceed five years. These permits are being reissued as TPDES individual storm water permits as they expire.

Notice of availability and an announcement of public meetings for this permit were published in the *Dallas Morning News*, *El Paso Times*, *The Monitor* (McAllen), *Amarillo Globe News*, *Houston Chronicle*, and *San Antonio Express News* on September 27, 2002. Public meetings were held in Arlington on October 28, 2002; Houston on October 29, 2002; and San Antonio on November 4, 2002. The original comment period ended on November 15, 2002.

On September 15, 2003, the U.S. 9th Circuit Court of Appeals (Court) in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir., 2003) issued a revised panel decision, which denied all petitions for rehearing and remanded portions of the Phase II rules affecting small MS4s to EPA. The Court found that portions of the federal regulations were not consistent with the Clean Water Act (CWA) because the Phase II rules did not address permitting authority review of notices of intent (NOIs), public participation in the permitting process, and public availability of NOIs. The EPA, by memorandum dated April 16, 2004, provided guidance for permitting authorities to issue general permits consistent with the panel decision. TCEQ revised the draft permit in accordance with the EPA memorandum. Notice of the proposed permit and an announcement of a public meeting on the revised permit were published in the *Dallas Morning News*, *El Paso Times*, *The Monitor* (McAllen), *Amarillo Globe News*, *Houston Chronicle*, *San Antonio Express News*, and *Waco Tribune Herald* on August 22, 2005, and in the *Abilene Reporter-News*, *Beaumont Enterprise*, *San Angelo Standard-Times*, and *Tyler Morning Telegraph* on August 26, 2005. A public meeting was held in Austin on September 29, 2005, and the comment period ended at the close of the public meeting.

Comments and responses are organized by section with general comments first. Some comments have resulted in changes to the permit. Those comments resulting in changes were identified in the respective responses. All other comments resulted in no changes. Changes made to the re-noticed permit based on 2002 comments are addressed by section after those comments that were received in either 2002 or 2005 that resulted in no changes or changes to the re-noticed permit. Due to the large number of comments received, some separate comments are combined with other related comments.

General Comments

Comment 1:

FWS comments that the permit does not contain adequate procedures to determine if storm water management programs (SWMPs) that were developed and implemented under the requirements of the permit will minimize harm to listed endangered species and critical habitats. FWS comments that the permit does not specifically identify the aquatic and water dependent, federally listed species as a part of TCEQ review process for authorizing permits. Additionally, FWS comments that the permit does not specifically address the potential for discharges to adversely affect listed species.

Response 1:

The permit was previously submitted to FWS for evaluation and they did not request changes to the permit to address the potential impact on any endangered species. The permit does not specifically identify the federally listed species that the permit may impact. An applicant must meet the minimum SWMP permit requirements regardless of whether the discharge of storm water is to a receiving water that serves as habitat for a listed species. The permit requires compliance with water quality standards approved by EPA for all areas of the state. These water quality standards are established in accordance with 30 TAC Chapter 307 to protect both aquatic and aquatic dependent species. Water quality standards approved by EPA are reviewed and analyzed by FWS for consistency with Endangered Species Act (ESA) mandates. Additionally, Part II.E.2. of the permit allows the executive director to require MS4 operators to apply for an individual permit if the activity is determined to cause a violation of water quality standards. FWS was given the opportunity during discussions with both the EPA and TCEQ to make recommendations and clarify any specific objections after submitting their formal comments. They have indicated in correspondence to both parties that they have no specific objections to the issuance of this permit.

Comment 2:

FWS comments that EPA and TCEQ should address the concerns provided in the FWS comments on the proposed permit during EPA review of the TPDES permit.

Response 2:

Accompanying the MOA between TCEQ and EPA delegating the federal NPDES to Texas was a Biological Opinion prepared for the delegation by FWS and required by the ESA for activities that constitute an "agency action" as defined by the ESA. The Biological Opinion contains FWS's evaluation of the potential impact to protected species by Texas' assumption of the NPDES program, specifically including the storm water program. In its opinion, FWS states:

"{I}t is the Service's biological opinion that the action of EPA's approval of the State of Texas' assumption of the NPDES permitting program, as proposed, is not likely to jeopardize the continued existence of all of the listed species considered in this opinion, and is not likely to destroy or adversely modify the designated critical habitat considered in this opinion."

In addition, the MOA states that "endangered species concerns will be addressed through interagency coordination" and sets out specific procedures to accomplish this coordination. The procedures specify that if FWS has concerns with the permit, TCEQ will work with FWS to resolve relevant issues. Should TCEQ not change the permit in response to FWS concerns, EPA is notified and provided the opportunity to review the draft permit. As noted in the previous response, TCEQ worked together with FWS and with input from EPA to ensure that FWS's questions were addressed in the permitting process. Based on this process, no changes to the permit were necessary based on FWS's review and there are no outstanding ESA issues.

Comment 3:

SOS comments that TCEQ has not tried to analyze the effects of discharges authorized by the permit on the propagation of aquatic species as required by the CWA.

Response 3:

The permit has controls to protect aquatic and water dependent species wherever they are located in the state. TCEQ has followed the procedures set out in the MOA with EPA on NPDES delegation, including consultation with FWS.

Comment 4:

SOS comments that any analysis by TCEQ on the likely effects of the permitting activities on water quality in the Barton Springs watershed must start with an estimate of the number of acres that will likely be developed in the watershed over the five-year term of the permit. SOS

comments that absent such an estimate it becomes impossible to make the subsequent estimates of likely discharges of pollution from construction, post-construction, and increased stream bank erosion.

Response 4:

This permit is designed for statewide applicability and is not based on watershed-specific evaluations. Additionally, the permit authorizes discharges of storm water runoff from construction activities conducted by MS4 operators commencing with the initial disturbance of the site and lasting until the site is stabilized and construction activities have ceased.

The potential for erosion in receiving waters is very site-specific, dependant on local topography, soils, rainfall, and other factors. This permit requires that MS4s develop SWMPs that address post-construction runoff in areas of new development and redevelopment and better address this potential problem at a more site-specific local level.

Comment 5:

SOS comments that TCEQ must determine that issuing this permit will not cause or contribute to a violation of water quality standards before issuing a permit. SOS asserts that there is nothing in the record, such as modeling or scientific studies, to predict discharges that would likely be authorized during the life of the permit in any particular watershed or indicate that TCEQ has undertaken adequate analysis to make this determination. SOS points out that "when individual applicants seek permission to discharge into waters of the State of Texas, extensive modeling is done of the discharges they will be allowed to put into state waters." Volume and concentration of key pollutants is analyzed and compared with specific watersheds to determine whether the discharges from a particular facility will cause a violation of water quality standards. SOS believes the same type of analysis should be done for this permit, such that TCEQ looks beyond numerical standards for particular pollutants, and also looks at particular watersheds and the discharges predicted for those watersheds.

Response 5:

The development of individual wastewater discharge permit conditions includes consideration of a known discharge rate, predictable pollutant parameters and concentrations, instream "low flow" or "worst case" conditions, and instream receiving water uses, and often includes modeling to ensure protection of instream dissolved oxygen standards. This approach is consistent with the Texas Surface Water Quality Standards, found at 30 TAC §307.8.

However, storm water discharges are intermittent and highly flow-variable and do not occur during instream low flow conditions. Therefore, procedures similar to those previously described have not been developed to set chemical-specific numeric effluent limits for storm water discharges, even in individual TPDES storm water permits. Instead, best management practices (BMPs) and technology-based controls are required to regulate the quality of storm water discharges. This approach is consistent with EPA's Interim Permitting Approach. This approach is consistent with the Texas Surface Water Quality Standards found at 30 TAC §307.8(e).

Comment 6:

SOS comments that this permit would, if adopted, violate state and federal anti-degradation requirements. SOS contends that under the anti-degradation standards for "Tier 2" waters as defined in 30 TAC §307.5, there is sufficient information available to demonstrate that additional protections are needed to avoid further violations of anti-degradation standards.

Response 6:

The antidegradation reviews required under state law for Tier 2 waters are to ensure that where water quality exceeds the normal range of fishable/swimmable criteria, such water quality will be maintained, unless lowering the criteria is necessary for important economic or social development. 30 TAC §307.5 and the Procedures to Implement Texas Surface Water Quality Standards, which are approved by EPA, set out TCEQ's process for accomplishing such review. In accordance with these procedures, TCEQ undertook an antidegradation review of this general permit and concluded that where the permit requirements and SWMPs are properly implemented no significant degradation is expected and existing uses will be maintained and protected.

Comment 7:

SOS comments that they had "recently submitted comments and information to TCEQ demonstrating that Barton Creek and Barton Springs should be included on the State's §303(d) list of impaired waters such that no permit may be issued that increases discharges of pollutant of concern."

Response 7:

Barton Creek (Stream Segment No. 1430) was listed on the 2000 §303(d) list as impaired because of elevated concentrations of fecal coliform bacteria. However, the 2004 §303(d) list of impaired water bodies, approved by EPA, and the draft 2006 §303(d) list do not include Barton Creek for any parameters. MS4 operators must develop an MCM to identify and eliminate any illicit discharges to the system such as cross-connected sanitary sewers that might contribute fecal coliform bacteria.

Comment 8:

SOS comments that issuing this permit will violate aesthetic water quality standards set forth in 30 TAC §307.4(b). Specifically, SOS cites as examples discharges of sediment in Barton Springs and Eliza Springs.

Response 8:

The permit requires that small MS4 operators develop and implement an SWMP to prevent pollution in storm water to the maximum extent practicable (MEP). The permit also requires the operator of these small, previously unregulated MS4s to develop a comprehensive SWMP. The SWMP is developed based on the six MCMs. The applicant must identify measurable goals and determine the effectiveness of the program by comparing implementation of the program to the measurable goals.

The permit requirements are consistent with EPA and TCEQ surface water quality standards. TCEQ Surface Water Quality Standards address aesthetics of water quality by requiring that "surface water shall be essentially free of floating debris and suspended solids that are conducive to producing adverse responses in aquatic organisms or putrescible sludge deposits or sediment layers which adversely affect benthic biota or any lawful uses" and "surface waters shall be essentially free of settleable solids conducive to changes in flow characteristics of stream channels or the untimely filling of reservoirs, lakes, and bays." (30 TAC §307.4(b)(2) and (3)).

Comment 9:

SOS comments that a statewide permit is inappropriate because it does not recognize that conditions differ among watersheds throughout the state and that some watersheds are more sensitive and threatened than others to pollutant loading from sediments. SOS further notes that FWS has determined that some Texas watersheds are more sensitive than others and require more protective permits issued in those areas.

Response 9:

This permit is intended for statewide applicability and does not require different levels of storm water management programs based on specific receiving water qualities because MS4 operators must implement controls to reduce the discharge of pollutants to the MEP. Instead, the permit has controls to protect aquatic and water dependent species wherever they are located in the state. The requirements of this permit are designed so they are effective in all watersheds.

Where water quality standards are not met in a stream segment, TCEQ will evaluate potential sources of the contaminant of concern in developing the Total Maximum Daily Load (TMDL) for that segment. If storm water is a source of that contaminant, it will be addressed in the TMDL and the TMDL implementation plan that is developed for that segment.

Comment 10:

SOS comments that the Edwards Aquifer Rules found in 30 TAC Chapter 213 are a "superficial and inadequate assurance that a general permit is protective of the sensitive Edwards Aquifer and Barton Springs Watershed." SOS contends the Edwards Aquifer Rules are "vague and lack enforceable requirements" and that its provisions do not adequately address the wide range of issues necessary to protect the aquifer. In addition, SOS attached their comments on the Edwards Aquifer rules and "ask that these comments be considered and addressed in the context of the proposed" permit.

Response 10:

Compliance with the applicable conditions of the Edwards Aquifer rules is in addition to compliance with the requirements of this permit. Comments on the Edwards Aquifer rules are outside the scope of this permit.

Comment 11:

SOS comments that the permitting activities will result in a "take" of the Barton Springs Salamander in violation of the ESA. SOS suggests that TCEQ either modify the permit to adopt conditions that will limit the effects of discharges so that no "take" of the Barton Springs salamander will be authorized or apply for an incidental "take" permit from FWS to administer this specific program in the Barton Springs watershed.

Response 11:

The permit does not authorize the taking of any listed species under the ESA. The permit was drafted in accordance with 30 TAC Chapter 307, which states that surface waters cannot be made toxic to any aquatic or terrestrial organisms. As such, the permit contains adequate safeguards to ensure that permitting activities authorized by TCEQ do not result in the "take" of any listed species and no specific provision is needed to address endangered species. Noncompliance with any provisions of the permit would fall within TCEQ's jurisdiction. However, as a federally delegated program, it is also EPA's responsibility to review the permit before it is issued. TCEQ provided EPA with the draft permit for review and to ensure that the terms and conditions are compliant with the CWA and the ESA. In addition, this concern was addressed in the Biological Opinion by FWS where it states:

"Any take associated with these permits is anticipated by the incidental take statement in the Biological Opinion on authorization of the TPDES program and, therefore, is covered, unless the Service submits a written concern to EPA on a draft TPDES permit due to potential adverse impacts to listed species that are more than minor and such concerns remains unresolved at the time of permit issuance, or where the Service believes that the permit is likely to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat."

Furthermore, this permit does not remove takings liabilities under the ESA for the MS4 operators. Section 9 of the ESA generally prohibits any person from "taking" a listed animal species, unless the take is authorized by the ESA. Section 10 of the ESA allows persons to "take" listed animal species, though otherwise prohibited, through the issuance of an "incidental take" permit. An "incidental take" permit requires development of a habitat conservation plan to ensure there is adequate minimizing and mitigating of the effects of the authorized "incidental take." These procedures were developed to allow non-federal entities to alter habitat without incurring takings liability where the "take" is minimized to the extent practicable.

Comment 12:

EIS comments that without any type of enforcement being written into TCEQ storm water program the purpose of the program is invalidated because businesses, municipalities, and other entities will not have consequences for noncompliance. EIS states that EPA has a standard daily fine and that TCEQ should also have financial penalties in place to make this program viable.

Response 12:

This permit is issued under the authority of TWC, §26.040 and thus is subject to the same enforcement provisions in TWC, Chapter 7, as any other TPDES permit issued under TWC, Chapter 26, including the penalty provision in §7.052(c), which allows for a penalty up to $10,000 a day for each violation.

Comment 13:

EIS comments that the permit makes no provision for compliance auditing by disinterested third parties to verify that MS4 operators are in compliance with the permit. EIS states that self-auditing through the annual reporting process was demonstrated by private companies to be ineffective. EIS also comments that TCEQ should have a 1-800 service with 24/7 reporting for the general public to report illicit discharges. In addition, EIS believes that TCEQ must put in place an immediate response system for illicit discharge reports, so that, for example, calls made on Friday evening are responded to before the following week.

Response 13:

Neither EPA Phase II storm water regulations nor the permit provide for compliance auditing by disinterested third parties. However, TCEQ has a number of methods for reporting environmental concerns. Persons may report environmental problems and complaints to TCEQ 24 hours a day by calling 1-888-777-3186 or by e-mailing *cmplaint@tceq.state.tx.us*. Persons may also report complaints to any of the 16 regional offices located throughout Texas. The location and contact information for these offices is on the TCEQ Web page at: *http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-002.html* (TCEQ Publication Number GI-002). Persons may report spills and other similar emergency situations through TCEQ's Environmental Release Hotline at 1-800-832-8224.

Comment 14:

Group 1 states that it is their conclusion that the permit goes beyond the federally mandated requirements as promulgated by EPA. Carroll & Blackman comments that TCEQ should only adopt regulation requirements and not elevate EPA recommendations contained in 40 Code of Federal Regulations (C.F.R.) to requirements in the permit. Group 1 comments that TCEQ should make every effort for consistency with the SWMP requirements in 40 C.F.R. because slight changes in wording or interpretation can and will cause unnecessary, large economic impacts to municipalities in the state.

Response 14:

The permit is based on the regulatory requirements of the federal NPDES program delineated in 40 C.F.R. Part 122. Specific comments regarding whether or not particular provisions of the permit exceed minimum federal requirements are addressed in separate comments throughout the response to comments.

Comment 15:

Dodson asks how TCEQ will inform the different MS4s of their requirements under the permit. Dodson notes there are many state universities, municipal utility districts (MUDs), and other districts that operate MS4s that may not consider themselves "municipalities." Dodson also comments that TCEQ should establish a training program to teach small MS4 personnel how to conduct inspections and about other permit requirements.

Response 15:

TCEQ has not established a training program that specifically teaches procedures of inspecting a small MS4. However, TCEQ continues to focus on an outreach effort that provides information on Phase II MS4 permit requirements and on other TPDES permitting requirements for other storm water discharges. TCEQ's Small Business and Environmental Assistance Division, the Field Operations Division, with staff located throughout the state in the 16 regional offices, and TCEQ's Water Quality Division have provided information to the regulated community on storm water permitting requirements through presentations, development of informational materials and resources, and site visits. Additionally, EPA has conducted a number of outreach efforts since finalizing the Phase II federal storm water regulations in December 1999, many of which are focused on reaching the operators of small MS4s. For example, EPA Region 6 has sponsored several annual conferences on MS4 permitting.

Comment 16:

Tome asks whether TCEQ will provide a model SWMP that cities can use to prepare their own SWMP.

Response 16:

A model Phase II SWMP was developed in 2001 for the TCEQ's Policy and Regulations Division - Galveston Bay Estuary Program. This document is available at: *http://gbic.tamug.edu/locgov/swmp.html*.

Comment 17:

HBA is concerned that the federal storm water program is being duplicated, instead of being delegated.

Response 17:

EPA delegated the NPDES permitting program, including the federal storm water program to TCEQ in 1998. In the case of the Phase II storm water regulations, EPA had not previously regulated small MS4s, therefore, this permit does not duplicate or replace a federal permit.

Comment 18:

HBA requests that TCEQ conduct a cost benefit analysis for the specific rules applicable to storm water and to follow the same guidelines as the federal government.

Response 18:

The federal storm water rules at 40 C.F.R. §122.26 and those additional provisions applicable to small MS4s at 40 C.F.R. §§122.30 - 122.37 were adopted by reference by TCEQ in 30 TAC §281.25, excluding guidance in §122.33 and §122.34. At that time, TCEQ determined that the adopted rules would not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. TCEQ does not conduct a cost benefit analysis when considering whether to adopt a general permit.

Comment 19:

TCCOS and Mathews & Freeland believe TCEQ should adopt an alternative approach to regulating municipal storm water discharges other than permitting. The commenters state that TCEQ's approach is duplicative and inefficient and would be economically burdensome to the affected municipalities. Also, the commenters state that TCEQ has existing statewide programs that satisfy one or more of the MCMs and could expressly recognize its role in the terms of the general permit. In situations where a municipality wants to implement and enforce a storm water regulatory program, TCEQ could enter into a cooperative agreement with the municipality, pursuant to TWC, §26.175.

Response 19:

40 C.F.R. §122.32 states that, unless you meet one of the waivers, a small MS4 is regulated if located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census. 40 C.F.R. §122.33(a) states that if you operate a regulated small MS4 "you must seek coverage under a NPDES permit issued by your NPDES permitting authority." The NPDES program was delegated to Texas in 1998 via a memorandum of agreement with EPA. Therefore, an alternative non-permitting approach to regulating small MS4s is not allowed by TCEQ rules.

Title Page

Comment 20:

Group 1 states that the cover page uses the term "surface water in the state," which is inconsistent with the remainder of the document that uses the term "waters of the United States" to describe the receiving stream.

Response 20:

The title page of the permit states that the discharges eligible for coverage under the permit are those to surface water in the state. Such authorization is consistent with TCEQ's general permitting authority in TWC, §26.040. The permit requires the MS4 operator to develop an SWMP and other controls for discharges that reach waters of the United States. This requirement is consistent with the federal storm water regulations delineated in 40 C.F.R. Part 122 and adopted by TCEQ in 30 TAC §281.25.

Comment 21:

HCFCD comments that the permit authorization language on the title page states that small MS4s may discharge directly to surface water in the state only according to the monitoring requirements and other conditions set forth in this general permit. HCFCD suggests revising the permit as follows because there are no monitoring requirements in the permit: ". . . only according to the conditions set forth in this general permit."

Response 21:

The permit does require monitoring of storm water discharges from concrete batch plants supporting construction activities and operated by MS4 operators authorized under this permit. Therefore, this revision is not necessary. However, some MS4 operators may choose storm water discharge monitoring as a method for determining the effectiveness of MCMs, for assessing attainment of measurable goals, and to assist TCEQ in monitoring compliance with the terms of the general permit.

Comment 22:

HCFCD asks that TCEQ clarify on the title page whether discharges from a small MS4 directly discharging into a large MS4 before entering surface water in the state is authorized by this permit. HCFCD suggests adding language to the title page that states that the permit authorizes discharges directly into surface water in the state or discharges directly into a Phase I MS4 before entering surface water in the state.

Response 22:

Authorization for discharges from a small MS4 where the MS4 operator is the construction site operator is required whether the discharge is directly or indirectly to surface water in the state. Discharges from a small MS4 to a separate MS4 will ultimately result in a discharge to a surface water in the state. Thus, TCEQ does not agree that this clarification is necessary.

Comment 23:

DAFB comments on the sentence in the title page stating that issuing the permit does not grant MS4 operators the right to use private or public property for conveyance of storm water. DAFB comments that the sentence seems to state that it is impermissible to convey storm water, as well as some undefined non-storm water discharges, on any property. DAFB suggest changing the sentence to: "The issuance of this general permit does not grant the permittee the right to use private or public property belonging to others for conveyance of storm water and permitted non-storm water discharge along the discharge route."

Response 23:

The language in this permit is the same as language included on the title page of all TPDES individual wastewater permits and clearly states that the "right to conveyance" is not authorized under the permit. If permission is necessary in order to convey the discharge across or along unowned property, it remains the MS4 operator's responsibility to obtain that permission.

Comment 24:

NCTRSW, Harris County, Houston, Missouri City, and HCFCD support the 2005 revision of the title page from "General Permit to Discharge Waste" to "General Permit to Discharge Under the Texas Pollutant Discharge Elimination System."

Response 24:

TCEQ agrees with this comment and this change was made to the general permit.

Definitions

Comment 25:

Cedar Hill requests providing a list of acronyms in Part I before the definitions. NCTRSW comments that the general permit or fact sheet should include a list of commonly used acronyms.

Response 25:

TCEQ agrees that this information is helpful and modified the permit to include 22 common acronyms following the definitions in Part I of the permit. Part I was divided into two sections, I.A., "Definitions," and I.B., "Commonly Used Acronyms."

Comment 26:

Sunland and NCTRSW request the addition of a definition for "classified segment" in order to comply with Part II.D.4.B.(8) of the permit. Grapevine requests a definition of the term "classified receiving waters" that appears in Section II.D.12.(c)(iv) of the permit.

Response 26:

In response to the comments, TCEQ added the following definition of "classified segment" to the permit: "refers to a water body that is listed and described in Appendix A or Appendix C of the Texas Surface Water Quality Standards, at 30 TAC §307.10."

Comment 27:

Euless asks whether formal consideration of a "common plan of development or sale" is needed or whether a common plan is assumed based on certain activities taking place at the site. Euless notes that "developments are not always presented as a common plan, even though it appears that a tract will be developed in parts," and that if a tract is developed in phases, a formal plan is submitted to the city for consideration.

Response 27:

In determining what is a "common plan of development" for purposes of the storm water permitting requirements under this general permit, the MS4 operator must consider all planned phases of a project and obtain the necessary authorization for each phase prior to commencing the initial construction. There is no specific requirement to formally consider a common plan, but any documentation regarding the overall project plan, such as plats or documentation describing separate phases, must be considered when determining the size of the construction site for purposes of determining the required level of regulation.

Comment 28:

Carroll & Blackman comments that the definition of "common plan of development" does not include language describing "in-fill development" issues, such as linear projects that are not contiguous but that are part of a master plan (e.g., water line construction). Carroll & Blackman states that noncontiguous projects are typically not considered to fit the definition of a "common plan of development."

Response 28:

TCEQ agrees that it is beneficial to clarify when related projects that are not contiguous are performed by an MS4 operator. In response to this comment, Part IV.C.2.d. of the fact sheet for the general permit was revised to include the following language at the end of the first paragraph. This language is based in part on existing guidance from EPA guidance on a similar question: "Where discrete construction projects within a larger common plan of development or sale are located greater than or equal to 1/4 mile apart, and the area between the projects is not being disturbed, each individual project can be treated as a separate plan of development or sale, provided that any interconnecting road, pipeline or utility project that is part of the same "common plan" is not concurrently being disturbed. For example, if a utility company was constructing new trunk lines off an existing transmission line to serve separate residential subdivisions located more than 1/4 mile apart, the two trunk line projects could be considered to be separate projects. If separate construction projects occur that are part of the same overall project and are less than 1/4 mile apart, then it would be appropriate to consider the combined acreage in determining the larger common plan."

Comment 29:

NCTCOG and Farmers Branch request changing the term "construction site operator," to something such as "municipal construction activities operator." NCTCOG and Farmers Branch comment that this change and additional language or guidance regarding construction vendors would help avoid confusion. Farmers Branch comments that this definition needs to include representatives of the MS4 and that the definition needs to substitute "one" for "all" of the following criteria.

Response 29:

The permit provides authorization for certain activities that are performed by the MS4 operator. Only operators of small MS4s are eligible for coverage under the permit. Therefore, only the MS4 operator may develop the seventh MCM for construction activities. The optional seventh MCM may authorize only the construction activities performed by the MS4 operator or activities performed by contractors for the small MS4 where the small MS4 continues to meet the definition of construction site operator. Contractors that meet the definition of a construction site operator must obtain separate authorization under the TPDES general permit for construction activities, TXR150000.

Comment 30:

NCTRSW comments that the definition for "construction site operator" may be read as offering the option of operator to either of the two categories of persons, while relieving the other category of persons of any responsibilities for permit compliance. NCTRSW states that clarification in a guidance document is appropriate.

Response 30:

The optional seventh MCM allows an MS4 operator to obtain coverage for construction activities in lieu of regulation under the TPDES Construction General Permit (CGP), TXR150000. Part III.A.7. of the general permit states that where the MS4 operator can meet the definition of construction site operator, the MS4 operator may obtain construction authorization under this general permit. Part III.A.7. also does not require contractors who work for the MS4 operator and do not meet the definition of construction site operator to obtain coverage for their work on construction sites under the TPDES CGP. The current definition of "construction site operator" matches the definition of "construction site operator" in the TPDES CGP and TCEQ believes that it is appropriate to keep these definitions the same.

If a construction site operator does not obtain coverage under this general permit via the seventh MCM, then the provisions of TXR150000 apply, which include permitting requirements for operators of small and large construction activities. The language in Part III.A.7. of the general permit and Part III.F. of the fact sheet describe when a regulated MS4 operator that is also a construction site operator may obtain coverage under the TPDES CGP.

Comment 31:

Grapevine comments that it supports the additional definition for "construction site operator," which will allow for more effective application of the regulation. Cedar Hill suggests providing examples of each type of construction site operator.

Response 31:

TCEQ declines to revise the permit language, because the existing language meets the federal storm water rules and is consistent with the existing TPDES CGP. In some cases, the examples listed previously may include a regulated MS4; however, there may be cases where a city or general contractor meets both definitions. In most cases, the MS4 operator will not meet the examples listed previously, which would more commonly apply to the CGP.

Comment 32:

Harris County, V&E, and Missouri City request clarification on the limits and jurisdiction of the terms "conveyance," "small MS4," and "surface water in the state." The commenters state that both MS4s and surface water in the state include man-made conveyances and ask whether an MS4 stops at the point that it discharges to surface water in the state. If not, the commenters ask whether it would affect existing structural controls that provide treatment if an MS4 locates the structural controls in surface water in the state. Harris County continues to support limiting TPDES storm water discharge general permits to discharges to "waters of the United States."

Response 32:

As defined in the permit, an MS4 is generally a publicly owned system, designed and used for collecting and conveying storm water, which may include roads and streets with drainage systems, catch basins, curbs, gutters, man-made channels, storm drains, and ditches. Surface water in the state as defined in the permit is generally any of a number of bodies of surface water (with the exception of waste treatment systems), fresh or salt, navigable or non navigable that are wholly or partially inside or bordering the state and subject to the jurisdiction of the State of Texas. There are instances where water may be both a surface water in the state and part of an MS4 though it is not possible to articulate all scenarios where it is one, the other, or both. For example, portions of an MS4 system, including ditches, may be a surface water in the state. As pointed out by EPA in the preamble to its Phase II storm water rules (64 FR 68722, 68757, December 8, 1999), a ditch may be part of an MS4. However, as with other jurisdictional provisions of the CWA, that determination requires case-specific evaluations of fact. Once a body of water is identified as a surface water in the state, it remains a surface water in the state downstream from that point.

Structural controls and treatment facilities cannot be constructed in surface water in the state for the purpose of treating discharges and meeting water quality standards. However, structures placed in surface waters for other purposes, such as flood control, can be designed, operated, and maintained in a manner using BMPs to reduce pollution. BMPs to operate and maintain these types of structures in such a manner can be used to satisfy certain requirements of the general permit.

Comment 33:

TCCOS and Mathews & Freeland comment that the definition of "discharge" is unnecessarily narrow and its use could create substantial ambiguity and uncertainty. The prohibition contained in TWC, §26.121 is a prohibition on the discharge of wastes and pollutants, not the type of liquid. By artificially narrowing the scope of the authorization to storm water and certain non-storm water discharges, TCEQ is expressly failing to address the discharge of wastes and pollutants that it knows are present in storm water runoff and in discharges from MS4s. TCCOS and Mathews & Freeland also ask whether the authorization to discharge only storm water includes the authorization to discharge all pollutants or wastes transported by the storm water. TCCOS and Mathews & Freeland request deleting the definition or changing the definition to the one used by EPA in its model general permit.

Response 33:

The authority for TCEQ to prohibit unauthorized, e.g., unpermitted discharges is found in TWC, §26.121. It states that except where authorized by rule, permit, or order issued by the commission, no person may discharge sewage, industrial waste, municipal waste, recreational waste, agricultural waste, or other waste into or adjacent to any water in the state. "Waste" is defined in TWC, §26.001(6) as "sewage, industrial waste, municipal waste, recreational waste, agricultural waste, or other waste as defined in this section." Storm water discharges are considered an "other waste" under the TWC and such discharges may be authorized under a general permit as allowed by TWC, §26.040. TCEQ acknowledges that storm water discharges may contain pollutants and the requirements of the permit were developed to eliminate or minimize these pollutants to the MEP.

Comment 34:

Cedar Hill requests that TCEQ clarify in the definition of "discharge" that a discharge is not allowable to the extent that it violates surface water quality standards.

Response 34:

Part II.C.3. of the general permit and III.D.2. of the fact sheet specify that the general permit does not authorize any discharges to surface water in the state that would cause or contribute to a violation of water quality standards or that would fail to protect and maintain existing designated uses.

Comment 35:

DAFB requests a definition of the term "Edwards Aquifer Recharge Zone."

Response 35:

The permit references 30 TAC Chapter 213 (relating to Edwards Aquifer). The definition of the Edwards Aquifer Recharge Zone, including a map delineating this area, is found in 30 TAC §213.22. TAC rules are accessible on the Texas Secretary of State Web site at: *http://www.sos.state.tx.us/tac/*.

Comment 36:

NCTRSW requests clarification of the definition of "final stabilization," possibly in a guidance document, regarding builder responsibilities. NCTRSW notes that the option allowing a homebuilder to meet final stabilization by providing information to the home buyer at the time of sale could produce a significant burden for maintenance and inspection of temporary control measures while a large number of homes are awaiting sale. NCTRSW suggests establishing a time limit for sale of a property. Cedar Hill requests removal of subsection (b)(2) from this definition.

Response 36:

The general permit allows a homebuilder to submit a notice of termination (NOT) before final stabilization is reached, provided that the homebuilder has established temporary stabilization and informed the home buyer of the need for final stabilization. If a large period of time elapses between the completion of the home and the sale, it may be more appropriate to establish final stabilization and submit an NOT prior to sale of the home. TCEQ recognizes that there may be very few periods of time when an MS4 operator will actually meet the role of homebuilder as construction site operator, but the occurrence of this situation is possible, therefore the definition was not changed.

Comment 37:

Harris County states that the term "native" is widely used to identify vegetation that existed before European settlement, but that nearly all construction activities wind up using ground covers such as St. Augustine, bermuda grass, and others, which are not "native" in the traditional sense. Harris County requests removing the term "native" from the definition.

Response 37:

The permit was not changed, as the definition is consistent with the existing TPDES CGP as well as EPA's CGP. For the purposes of this permit, "native" refers to the amount of vegetation that was present prior to construction, not the type of vegetation. It is not necessary to select a type of vegetation that is native to the site for stabilization.

Comment 38:

NASA comments that the definition of "groundwater infiltration" refers to groundwater entering a sanitary sewer system, but comments that for the purposes of this permit, the definition should refer to "groundwater that enters a storm sewer system." NCTRSW, Harris County, Missouri City, Carroll & Blackman, HCFCD, HCEC, Houston, and TxDOT-Houston also request changing "sanitary sewer system" to "storm sewer system" in this definition. Carter & Burgess requests changing it to "MS4." Cedar Hill comments that the definition sounds like the definition that is used for infiltration as it relates to the sanitary sewer system and requests clarification of "storm sewer system."

Response 38:

In response to the comments the definition was revised as follows: "Ground Water Infiltration - For the purposes of this permit, groundwater that enters a municipal separate storm sewer system (including sewer service connections and foundation drains) through such means as defective pipes, pipe joints, connections, or manholes."

Comment 39:

Cleburne comments that the current definition of "illicit discharge" will make it difficult and unrealistic to determine techniques for finding and eliminating illicit discharges. Illicit connections can be identified and controlled, but many other types of materials enter the storm sewer from non-point sources.

Response 39:

The definition in the permit is from the federal storm water regulation at 40 C.F.R. §122.26(b)(2), which was incorporated by reference in 30 TAC §281.25. The description of what is an illicit discharge should not limit the MS4 operator's ability to develop an MCM to identify and limit these discharges. The permit requires development of an SWMP that is almost entirely based on pollution prevention. For compliance with the requirements of the permit, the MS4 operator must develop and implement an illicit discharge detection and elimination MCM that reduces these discharges to the MEP. MS4 operators are allowed latitude to develop and focus the program so that it is centered on local issues, site-specific conditions, and water quality concerns. The MS4 operator may have limited control over some contributions to the system; some prohibited materials may remain in a discharge from an MS4 that is otherwise in compliance with the permit.

Comment 40:

Grapevine comments that the phrase "or a separate authorization" in the definition of "illicit discharge" may raise some concern. However, Grapevine acknowledges that the phrase would not jeopardize protection of human health or the environment and added that the statement can be used as an additional management tool by regulatory authorities.

Response 40:

The permit includes the general phrase "or a separate authorization" so that any TPDES or other authorized discharge is not necessarily considered illicit. While most direct discharges only occur under a TPDES permit, it is possible that a discharger may have a state-only discharge authorization and an NPDES permit from the EPA.

Comment 41:

Carroll & Blackman recommends replacing the phrase "is not entirely composed of storm water," in the definition of "illicit discharge" with the following phrase: "is composed of significantly polluted storm water." Carroll & Blackman states that the current definition assumes that storm water runoff will not contain naturally occurring constituents as a result of normal runoff conditions, but that storm water pollutants are naturally occurring and should not constitute an illicit discharge.

Response 41:

The definition was retained, as it is consistent with the federal definition of "illicit discharge at 40 C.F.R. §122.26(b)(2), with the exception of the reference to NPDES permits. The definition in this general permit includes more general terminology in order to ensure that any dis-

charge that is otherwise authorized under an appropriate permit or rule mechanism would not necessarily be considered illicit.

Comment 42:

DAFB requests including the definition of "impaired waters" given in Part II.C.4. in Part I of the permit.

Response 42:

As stated in Part II.C.4., "impaired waters" are those that do not meet applicable water quality standards and are listed on the CWA, §303(d) list. The current EPA-approved 2004 and draft 2006 Texas CWA §303(d) lists of impaired water bodies, as well as information on how these waters are identified and listed, is available at: *http://www.tceq.state.tx.us/compliance/monitoring/water/quality/data/wqm/305_303.html#y2004.* TCEQ declines to also include the definition in Part I of the permit.

Comment 43:

Tarrant County suggests using language from the multi-sector general permit (MSGP), TXR050000, to avoid confusion with nonregulated local government activities and notes that the term "industrial activities" is used in the permit at Part III.A.4.(e), related to Municipal Operations and Industrial Activities. NCTRSW comments that Part I of the permit should include a definition of those industrial activities that meet the applicability requirements for TCEQ industrial storm water discharge permits. NCTRSW states that there is a potential for confusion regarding regulated and nonregulated industrial activities and believes that a definition, or guidance within the fact sheet, would assist MS4s in developing a list of industrial activities required at Part III.A.4.(e). of the permit.

Response 43:

TCEQ agrees it is beneficial to add a definition for "industrial activities," since the term is used in the general permit. In response to the comments, the following definition was added to Part I of the permit: "Industrial activities - manufacturing, processing, material storage, and waste material disposal areas (and similar areas where storm water can contact industrial pollutants related to the industrial activity) at an industrial facility described by the TPDES Multi Sector General Permit, TXR050000 or by another TCEQ or TPDES permit."

Comment 44:

GCHD asks what constitutes a land disturbance.

Response 44:

Land disturbance includes, but is not limited to, the common activities of clearing, grading, and excavating a site. Other activities may also occur and result in soil disturbance such as: construction vehicle/equipment traffic and storage; on-site storage of construction materials; demolition; and other activities that result or lead to a land disturbance.

Comment 45:

Houston comments that the definition of "large construction activity" appears to include only activities such as "clearing, grading, and excavating." Houston asks whether areas disturbed by concrete batch plants, asphalt batch plants, equipment staging areas, material storage yards, material borrow areas, excavated material disposal, and other industrial activities are counted when determining whether a "construction activity" will disturb the required amount of area.

Response 45:

Areas disturbed by supporting activities, such as those listed in the comment, must be included in the total number of acres disturbed if the support activity solely supports the construction activity and is located within one mile of the construction site, or if the support activity is authorized to discharge storm water under this permit.

Comment 46:

Grapevine expressed its support for the revisions to the definition of "large construction activity" that lists activities that are not considered construction activities (e.g., routine grading of existing roads).

Response 46:

In response to the comments the definition of "large construction activity" was changed to help clarify what activities were not considered activities that require storm water permit coverage. The following sentence was added to the definition: "Large construction activity does not include the routine grading of existing dirt roads, asphalt overlays of existing roads, the routine clearing of existing right-of-ways, and similar maintenance activities."

Comment 47:

Cedar Hill requests including the following sentence in the definition of MEP: Implementation of BMPs consistent with the provisions of the Storm Water Management Plan (SWMP) developed in accordance with the TPDES TXR040000 General Permit.

Response 47:

The definition was not revised because it is consistent with the description of MEP in the federal CWA and federal rules at 40 C.F.R. §122.34. The fact sheet includes the following sentence at Part IX: "TCEQ believes that the requirements of the permit, if properly implemented, will meet the MEP standard required in the federal rules at 40 C.F.R. §122.34."

Comment 48:

Universal City, HCEC, and TxDOT-Houston request replacing the term "MS4 Operator" with the federal definition of "owner or operator" at 40 C.F.R. §122.2 because the permit definition appears to impose inappropriate compliance obligations on contracted entities and moves significantly beyond federal requirements regarding who must obtain permit authorization. The commenters also believe that this definition may inadvertently restrict an operator's ability to outsource compliance activities if those contractors could be subjected to permit enforcement actions. The commenters state that TCEQ should address third party failures in the context of interlocal agreements or contracts because this will allow more flexibility in outsourcing services.

Russell Moorman and Carter & Burgess state that the current definition of "MS4 Operator" includes the phrase "entity contracted by the public entity" but that the permit does not clarify that phrase. Russell Moorman notes that this part of the definition appears very broad and may require multiple entities to submit NOIs for the same regulated MS4. Russell Moorman requests clarification regarding who must submit an NOI if two MS4s have an interlocal agreement such that each MS4 operator has the responsibility to implement one or more MCM for the other MS4 operator. For example, are both operators required to submit NOIs for each MS4 area where they implemented any part of the SWMP. Russell Moorman asks a similar question with respect to private companies that are contracted to implement part or all of an SWMP for an MS4, i.e., whether the private company is considered an MS4 operator. Russell Moorman suggests revising the definition of "MS4 Operator" to include only the small MS4 itself, and indicated that the SWMP could identify any additional existing contractual relationships that could affect the operation of the MS4. Grapevine comments that the addition of the statement "and/or the entity contracted by the public entity" will allow for more effective application of the regulation.

Carter & Burgess asks for clarification of the definition so that the contracted entity is only responsible for the portions of the SWMP that it has a contract to implement. Carter & Burgess requests replacing the definition with the following description: "The public entity responsible for the operation and maintenance of the MS4 that is subject to the terms of this permit, and any entity contracted by that public entity to implement a portion of the SWMP." Carroll & Blackman comments that the definition could be misinterpreted to mean that a consultant working for a municipality or a contractor performing maintenance on the MS4 would need to obtain permit coverage. Carroll & Blackman suggests finding another mechanism for requiring permit coverage for those specific contractors TCEQ intends to include in this definition. Cedar Hill requests revising the definition to include examples, such as "municipality, city manager, and/or mayor.

Response 48:

TCEQ recognizes that MS4 operators may utilize contracted entities to implement a portion of the SWMP; however, the intent of this permit is to require compliance of the MS4 operator. There may be some circumstances where the MS4 completely delegates authority to operate the MS4 to another entity, including operations that are not specifically related to the SWMP. Where the contracted entity has sole control over the MS4, including the SWMP, the contracted entity must obtain permit coverage, and the public entity may also require coverage. However, if the MS4 owner retains operational authority over the MS4, then any contracted entity hired to implement portions of the SWMP is considered a subcontractor and is not expected to obtain coverage.

Comment 49:

Harris County requests revising the definition of "notice of intent" to differentiate it from other NOIs required for other storm water and wastewater general permits.

Response 49:

The definition included in the permit is consistent with the definition in 30 TAC Chapter 205 (relating to General Permits for Waste Discharge). 30 TAC §205.1(5) defines an NOI as "a written submittal to the executive director from a discharger requesting coverage under the terms of a general permit."

Comment 50:

Harris County, Houston, Missouri City, HCFCD, HCEC, and TxDOT-Houston request revision of the definition of "outfall" by replacing the term "surface water in the state" with "waters of the United States" for consistency with the EPA's definition of "outfall" in 40 C.F.R. §122.26(b)(9). Harris County notes that the definition, as written, presumes that there is a difference between an MS4 and surface water in the state and states that substantial case law has demonstrated that storm sewers are water in the state. According to Harris County, the current definition in the permit undermines the authority that environmental enforcement agencies have in protecting against pollution through the solid waste and water pollution regulations.

Response 50:

TCEQ rules at 30 TAC §305.2(25) define an outfall as being where an MS4 discharges into or adjacent to surface water in the state. TCEQ recognizes that there may be cases where a drainage ditch that is part of an MS4 is considered surface water in the state. The requirement of the general permit that relates to outfalls is the Illicit Discharge Detection and Elimination Minimum Control Measure (MCM), which requires an MS4 operator to map all outfalls from the MS4. The MCMs are part of the SWMP and the MS4 operator must implement the SWMP where discharges reach waters of the U.S. Therefore, in order to clarify the intent of this general permit, the definition was revised to replace the term "surface water in the state" with "waters of the U.S." TCEQ also added the phrase "for the purpose of this permit," to the beginning of the definition, to differentiate between outfalls that are specific to this permit and other outfalls defined in the TPDES program. The definition now is as follows: "Outfall - For the purpose of this permit, a point source at the point where a municipal separate storm sewer discharges to waters of the United States (U.S.) and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels, or other conveyances that connect segments of the same stream or other waters of the U.S. and are used to convey waters of the U.S."

Comment 51:

TxDOT asks for clarification regarding whether the definition of "outfall" includes discharges to ephemeral drainage channels that carry water only during and shortly after rainfall events.

Response 51:

Waters of the U.S. may include intermittent streams as described in the definition for "waters of the U.S." found in the general permit.

Comment 52:

NCTRSW comments that the definition of "outfall" was simplified from the original draft permit, but also notes that there is not always a clear point of discharge from a municipal drainage system. NCTRSW requests clarification regarding municipal and state responsibilities for determining the point of discharge into surface water in the state and states that the guidance should include consideration of the requirements for system mapping in Part III.A.3.(c.) of the general permit. Tarrant County comments that the definition in the permit is sufficient if TCEQ designates a map to help MS4 operators identify surface water in the state or waters of the U.S.

Lloyd Gosselink requests revising the definition of "outfall" to specify that an outfall is related to the conveyances of an MS4 (i.e., storm sewer pipes, ditches, and conveyances owned by the MS4) into surface water in the state. Lloyd Gosselink believes the definition is overly broad and could be interpreted to include the point of discharge from any regulated area, regardless of whether such runoff is conveyed through an MS4.

Response 52:

Outfalls that discharge from facilities that are otherwise regulated under the TPDES program, such as a TPDES wastewater outfall, may be a direct discharge into water in the state or a discharge into an MS4. These are not MS4 outfalls, but if they discharge to an MS4, then the MS4 operator could address them as part of their Illicit Discharge Detection and Elimination Program. The general permit requires the MS4 operator to develop its outfall map using existing information such as federal or state maps and publications.

MS4 operators can locate information regarding the classified segment(s) receiving discharges from the MS4 in the "Atlas of Texas Surface Waters" at the following TCEQ Web address. This document includes identification numbers, descriptions, and maps: *http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-316/index.html*.

MS4 operators can find the latest EPA-approved list of impaired water bodies (the Texas §303(d) List) at the following TCEQ Web address: *http://www.tceq.state.tx.us/compliance/monitoring/water/quality/data/wqm/305_303.html#y2004.*

Persons may find information on unnamed receiving waters that are not listed as impaired on United States Geological Survey topographic maps or TxDOT County Maps, which are used in the TPDES pro-

gram to delineate the discharge route of a particular facility (see 30 TAC §305.45(a)(6)). The EPA's web site contains current information on the definition and rulings regarding "waters of the U.S." at: *http://www.epa.gov/owow/wetlands/guidance/SWANCC/*.

This information may also help develop the outfall map.

Comment 53:

Cedar Hill comments that it is not clear when a conveyance is not surface water in the state and requests clarification so it can better determine outfall locations. Cedar Hill asks for revision of the definition to clarify when a conveyance is not surface water in the state.

Response 53:

MS4 operators will determine what portion of the conveyance system is part of the MS4 and there may be cases where a drainage ditch or similar intermittent channel may also be considered water in the state. As discussed previously, the definition for "outfall" was revised to require mapping only for those point sources that discharge into waters of the U.S.

Comment 54:

TxDOT asks whether the phrase "does not include open conveyances connecting two MS4s" includes two underground MS4 connections. TxDOT requests clarification in the fact sheet or permit as to whether an underground connection is an outfall. Carroll & Blackman comments that the purpose for identifying outfalls is to support detection of illicit discharges and believes that locations where one MS4 drains to another MS4 are important locations to include. TxDOT states that it is common for one MS4, such as a city, to drain to another MS4, such as TxDOT, but that these connections are not considered outfalls based on the current definition in the permit. TxDOT states that the permit should specifically refer to crossings or siphons of a drainage system feature under or through a highway feature if the intent is to describe them in this section.

Response 54:

The outfall map does not have to show connections from one MS4 to another because the definition only pertains to discharges directly into waters of the U.S. If an MS4 operator receiving a discharge from an adjacent, unregulated MS4 believes that the adjacent MS4 is substantially contributing pollutants into the downstream MS4, then they may petition TCEQ to require permit coverage for the unpermitted MS4. EPA developed an "Illicit Discharge Detection and Elimination" guidance manual (October 2004) and Chapter 11 of that document includes guidance on mapping outfalls that discharge into stream segments. This document is available online at: *http://www.cwp.org/IDDE/IDDE.htm*.

Comment 55:

Carter & Burgess comments that the replacement of the original definition for "major outfall" (36-inch diameter pipe or draining more than 50 acres) with this definition will result in a tremendous amount of work for each regulated MS4, if they have to map points of any size. Carter & Burgess states that this effort is not practicable and that compliance with this new definition would exceed the requirement to meet MEP.

Response 55:

The definition for "outfall" was included because the requirement to map all outfalls, rather than only major outfalls, was changed in the general permit. This change was made for consistency with the federal rules that require small MS4 operators to map all outfalls (40 C.F.R. §122.34(b)(3)(ii)(A)).

Comment 56:

Carter & Burgess notes that the definition of "outfall" includes by reference the full definition of "point source" as defined in the federal rules in 40 C.F.R. §122.22. Carter & Burgess notes that the definition in the permit includes vessels and floating crafts, which are difficult for a regulated MS4 to map as an outfall and request that the definition simply begin with "The point at which . . .."

Response 56:

While there may be no circumstances where an MS4 discharges from a floating vessel, or from other facilities listed in this definition, this wording is consistent with the federal definition for "outfall" and was not revised.

Comment 57:

Harris County, Houston, Missouri City, HCFCD, HCEC, and TxDOT-Houston request revising the definition of "point source" to include the following wording from 40 C.F.R. §122.22, which the commenters believe was omitted from the second line: ". . . including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated . . .."

Response 57:

In response to the comments, this change was made in the permit.

Comment 58:

Universal City, HCEC, and TxDOT request adding the definition of "pollutant" from 40 C.F.R. §122.2 to the permit.

Response 58:

TCEQ declines to add the definition, but notes that Texas Water Code, §26.001(13) includes a definition for "pollutant," which applies to water quality permits issued by the TCEQ.

Comment 59:

Sunland requests adding a definition of "population" in the permit or that TCEQ clarify how "population" is defined for nonresidential MS4s in evaluating the possibility of obtaining a waiver under Part II.F. of the general permit. Sunland points out that MS4s such as transportation agencies, airports, and universities may not have a residential population and further notes that federal rules at 40 C.F.R. §122.32(a) appear to indicate that these entities are regulated, unless they qualify for a waiver.

Response 59:

TCEQ declines to add a definition for "population." For the purposes of determining a "very discrete system," the term "population" refers to those people who work at an office, study/take classes at a school, or otherwise visit a building or office complex. For the purpose of determining the population served by an MS4 seeking a waiver, an MS4 operated by a city or other public body that has a residential population would use the residential population that is located within the regulated area. EPA provides a population list for some MS4s in Texas at the following web address: *http://www/epalgov/npdes/pubs/texas.pdf*.

For MS4s without a residential population, the population served within an urbanized area may include persons who live outside of the urbanized area, including visitors and employees. For example, if the MS4 is a transportation district within an urbanized area, then the "population served" would include the number of daily users as well as the employees of the system.

Comment 60:

DAFB requests defining the term "footprint" in the permit because that term is used in the definition of "redevelopment."

Response 60:

The term "footprint" is used to describe the outline and area occupied by an existing site, and may include such things as buildings and parking lots. If the structure is further developed, then it is the change in the area of the "footprint" that must be considered in determining if an acre or more of land will be disturbed and whether it must be addressed in the redevelopment MCM. Remodeling the interior, remodeling the exterior facade of the building, or repaving the parking lot would not increase the "footprint" and would not trigger permitting requirements related to the redevelopment MCM, regardless of the magnitude of the project.

Comment 61:

Houston comments that the definition of "small construction activity" appears to include only activities such as "clearing, grading, and excavating." Houston asks whether areas disturbed by concrete batch plants, asphalt batch plants, equipment staging areas, material storage yards, material borrow areas, excavated material disposal, and other industrial activities are counted when determining whether a construction activity will disturb the required amount of area.

Response 61:

The total number of acres disturbed must include the related support activities, such as those listed in the comment, if the support activity solely supports the construction activity and is located within one mile of the construction site or if the support activity is authorized to discharge storm water under this permit.

Comment 62:

Grapevine expressed its support for the revisions to the definition, which lists activities that are not considered construction activities (e.g., routine grading of existing roads).

Response 62:

The revised definition was changed following the original public comment period and is now consistent with the TPDES CGP, TXR150000.

Comment 63:

TxDOT requests clarification of the definition of "small MS4" in regard to streets and roads. TxDOT believes that not all of the street or road is part of an MS4. For example, the crown of a road and most roadway lanes are not designed to convey flow. Usually, only curbs, gutters, roadside ditches, or underground storm sewers are used to convey flow. Cedar Hill requests revising the definition to include culverts with curbs, gutters, ditches, etc.

Response 63:

As stated in the definition, a small MS4 refers to "a conveyance or a system of conveyances . . . designed or used for collecting or conveying storm water; . . .." The definition of conveyance specifically includes curbs and gutters, plus other structures that are designed and maintained to carry storm water runoff. Roads are designed and constructed to transport vehicles, with an element of the design used for prevention of flooding and pooling of water. For MS4s that include roads, it is appropriate to consider as the MS4 only those parts that are specifically designed and used primarily for conveying storm water.

Comment 64:

NASA and Mathews & Freeland comment that the definition of "small MS4" is vague and ambiguous regarding the exclusion of "very discrete systems such as those serving individual buildings." NASA notes that the definition does not include a size of office or education complexes that could meet the criteria of "very discreet system." As such, the definition could be understood to exclude a large federal government complex that does not serve a residential population. NASA notes that in its preamble to the NPDES Phase II storm water rules (64 FR page 68749), the EPA specifically addressed including federal facilities in the rules when the federal facility is similar to other regulated MS4s. However, NASA states that a large federal government complex with no residential population is unlike other regulated MS4s that serve significant residential populations whose uncontrolled activities may contribute to storm water pollution. NASA notes that these types of activities are either prohibited or controlled on these government complexes. Further, NASA states that the term "transient" does not accurately describe most office and education complexes, because the workers and students, while "non-residential," are also "non-transient" because they are present on a recurring and routine schedule over an extended period of time. NASA requests revising the definition of "small MS4" to remove the ambiguity with respect to "very discrete systems" and to clarify who must apply for coverage under the permit. Mathews & Freeland comments that the permit uses the term "discrete" in the exclusion as if it means limited in geopraphic extent. However, the exclusion fails to convey any sense of the limiting geographic scope. Mathews & Freeland recommend modifying the definition to state that all federal or state entities that own or control land are subject to the permit requirements. Additionally, TCEQ should modify the definition to state: *(iv) Which does not include systems owned by MS4 operators whose systems throughout the state serve less than one acre*. Harris County, Houston, Missouri City, HCFCD, HCEC, and TxDOT-Houston recommend changing the word "discreet" to "discrete" in the definition of "Small MS4."

Response 64:

Use of the term "transient" in describing a very discrete system could be interpreted to mean that only those public entities that serve tourists and visitors are exempted. However, the intent is to clarify that certain facilities such as office buildings and secondary schools are not required to obtain permit coverage just because they operate storm drains, so long as the drains do not function as a "system." The intent is to require any drainage conveyances that truly operate as a "system" to obtain coverage, regardless of whether residents are present at the site. Accordingly, the term "transient" was removed from the definition, and the parentheses were removed from the term "nonresidential." The federal definition of "MS4" specifically includes systems that are similar to large hospital or prison complexes, and the definition in this permit was revised to include those larger complexes. Similarly, it is appropriate to consider that certain smaller complexes may not act as "systems," and so the definition was further revised to replace the term "municipal" with "certain." The revised portion of the definition reads as follows:

(iv) Which is not part of a publicly owned treatment works (POTW) as defined at 40 C.F.R. §122.2; and (v) Which was not previously authorized under a NPDES or TPDES individual permit as a medium or large municipal separate storm sewer system. This term includes systems similar to separate storm sewer systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. This term does not include separate storm sewers in very discrete areas, such as individual buildings. For the purpose of this permit, a very discrete system also includes storm drains associated with certain municipal offices and education facilities serving a nonresidential population, where those storm drains do not function as a system, and where the buildings are not physically interconnected to an MS4 that is also operated by that public entity.

Comment 65:

Universal City, HCEC, and TxDOT-Houston request adding a definition of "medium MS4" and "large MS4." HCEC comments that the addition would provide clarification and recommends either adding an explicit definition or including by reference the federal definition.

Response 65:

These terms are both used in the definition of "small MS4." Therefore, it is appropriate to reference the federal definitions in the general permit. The phrase "as defined at 40 C.F.R. §122.26(b)(4) and (b)(7)" was added to the definition of "small MS4" as follows: *(v) Which was not previously authorized under a NPDES or TPDES individual permit as a medium or large municipal separate storm sewer system, as defined at 40 C.F.R. §§122.26(b)(4) and (b)(7) . . ..*

Comment 66:

V&E comments that the phrase "surface runoff and drainage" within the definition of "storm water" is not limited to storm water and snow melt. Substances other than storm water and snow melt may result in surface runoff and drainage. V&E recommends adding the word "thereof" at the end of the sentence of this definition to clarify the kinds of surface runoff and drainage that are addressed.

Response 66:

The phrase "surface runoff and drainage" could be interpreted to occur as a result of something other than rainfall, snowfall, and other types of atmospheric precipitation. For example, additional sources may include runoff resulting from pavement washing or runoff resulting from natural springs. This phrase in the definition of "storm water" is used the same way as in the federal definition of "storm water" and adopted by reference in the state regulations (40 C.F.R. §122.26(b)(13) and 30 TAC §281.25). Therefore, to maintain consistency, this change was not made to the definition.

Comment 67:

Cedar Hill requests redefining the term "storm water" to "precipitation that drains offsite" and comments that it currently sounds like the definition is being defined with a definition.

Response 67:

The definition was taken from the federal definition for "storm water." However, it may be confusing since the term is included in the definition. TCEQ is revising the definition for consistency with the existing TPDES MSGP and the Texas Surface Water Quality Standards at 30 TAC §307.3(a)(54). The definition of "storm water" in the permit was changed to: "Rainfall runoff, snow melt runoff, and surface runoff and drainage."

Comment 68:

Cedar Hill requests revising the definition of "storm water associated with construction activity" as follows: "Discharge from an area where there is either a large or small construction activity."

Response 68:

TCEQ declines to revise the definition, because the term "storm water" is defined in the permit.

Comment 69:

TxDOT requests revising the definition of "structural control (or practice)" to include vegetative lined ditches or vegetative filter strips in the list of examples and comments that these controls are more common than some of the others that are listed.

Response 69:

In response to the comment, the definition of "structural control (or practice)" was revised to include vegetative lined ditches and vegetative filter strips to the list of examples.

Comment 70:

V&E requests practical guidance on how "surface water in the state" and "waters of the U.S." differ and asks that a couple of concrete, practical examples where a discharge into surface water in the state would not ultimately reach waters of the U.S. TxDOT-Lubbock asks whether TCEQ considers playa lakes under its jurisdiction for TPDES purposes in light of the Solid Waste Agency of Northern Cook County (SWANCC) decision that ruled that isolated waters of the U.S. whose only nexus to interstate commerce is migratory birds are not under the jurisdiction of the U.S. Corps of Engineers.

Response 70:

Surface water in the state includes certain playa lakes and isolated wetlands that may not be waters of the United States. Thus, TCEQ considers playa lakes under its jurisdiction for TPDES purposes. Also, storm water that infiltrates or is absorbed into soil, and does not run off, is not considered a discharge to surface water in the state or a discharge to waters of the United States.

Comment 71:

Tarrant County requests that TCEQ designate a map to help identify "surface water in the state" or "waters of the U.S." so that MS4 operators can appropriately map the locations of all outfalls discharging from the MS4. Grapevine comments that the terms "surface water in the state" and "waters of the U.S." need clarification and further description and suggests that TCEQ use a map displaying these designated waters. HCEC states that the definition for "surface water in the state" must exclude man-made or artificial systems, and comments that leaving the terms in the permit would result in the regulation of discharges to retention ponds and storm water quality wetlands, when the permit should regulate discharge from those structures.

Response 71:

The definition in the general permit for "surface water in the state" is taken directly from the definition of "water in the state" at TWC, §26.005(5), except leaving out "groundwater, percolating or otherwise. . .." However, no changes were made to the definition because it is consistent with TCEQ's authority to regulate unauthorized discharges under TWC, §26.121 and its general permitting authority under TWC, §26.040.

TCEQ Publication Number GI-316, "Atlas of Texas Surface Waters," provides information and maps of various surface waters in Texas. An electronic version of the document can be found on TCEQ's Web site at: *www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-316/index.html*.

Comment 72:

TxDOT requests revising the definition or fact sheet to clarify whether ephemeral creeks are considered surface water in the state.

Response 72:

The term "water in the state" does include intermittent streams. Both intermittent streams and intermittent streams with perennial pools are included in the Texas Surface Water Quality Standards at 30 TAC Chapter 307 and no further clarification was made to the permit or fact sheet.

Comment 73:

HCFCD and Universal City comment that for clarity, the definition of "total maximum daily load (TMDL)" should reference the precise regulatory definition as well as the brief definition provided in the permit. HCED and TxDOT-Houston comment that the definition of TMDL should reference the precise federal regulatory definition. Harris County, Houston, Missouri City, and HCFCD request revision of the definition to TMDL to: "Total Maximum Daily Load (TMDL) -

a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet the Texas Surface Water Quality Standards." Carter & Burgess asks why the definition was changed from "maximum amount of a pollutant" to "total amount of a substance," and asks whether TMDLs are developed for substances other than pollutants.

Response 73:

The definition of TMDL in the permit is identical to the definition found in the Texas Surface Water Quality Standards at 30 TAC §307.3(a)(61), which references substances rather than pollutants. Though TMDLs are established for pollutants, it is appropriate to use the more general term, "substance" that is already included in TCEQ rules. The federal definition of TMDL is found in the federal rules at 40 C.F.R. §130.2(i). The description of the TMDL Program, guidance, and information related to assessing water quality is provided on TCEQ's Web site at: *http://www.tceq.state.tx.us/implementation/water/tmdl/index.html/*.

Permit Applicability and Coverage

Comment 74:

DAFB requests revising the introductory paragraph in Part II. to: "discharges from small municipal separate storm sewer systems (SMS4) to surface" and throughout the permit using the abbreviation SMS4 for small municipal separate storm sewer systems.

Response 74:

TCEQ declines to adopt the acronym suggested by DAFB. The definition in the permit for the small MS4 includes as acceptable acronyms "small MS4," "MS4,"or "System" for the term small MS4, unless otherwise stated.

Comment 75:

TDCJ asks whether agricultural operations are exempt within an MS4.

Response 75:

The CWA contains an exemption for agricultural operations that meet certain requirements from being considered a point source discharge. Where agricultural operations meet the statutory definition they are not subject to TPDES storm water permitting requirements. The definition of "point source" in the permit specifies that discharges from return flows from irrigated agriculture or agricultural storm water runoff are not considered point sources if they meet the applicable requirements in the CWA.

Comment 76:

Harris County asks if private, gated communities located in unincorporated areas of the county or urbanized area need to apply for coverage under the permit.

Response 76:

The permit affects certain publicly owned separate storm sewer systems located within urbanized areas. If the storm sewer system is privately owned and operated, these permit requirements would not apply regardless of location.

Comment 77:

Harris County asks for clarification regarding how MUDs and private communities may obtain coverage under the permit.

Response 77:

Privately owned and operated MS4s are not subject to the NPDES storm water regulations and are therefore not eligible for coverage under the permit. MUDs that operate MS4s and that are located within an urbanized area may obtain coverage by submitting an NOI, an SWMP, and a $100 application fee. After the permit is issued, a description of the process will be available at: *http://www.tceq.state.tx.us/permitting/water_quality/stormwater/storm-water-navigation/ms4.html.*

Comment 78:

Travis County requests information on the responsibilities of special water districts such as MUDs and water control improvement districts (WCIDs) within an MS4 under the general permit, and asks whether an MS4 operator has the authority to require these districts within an MS4 to perform some of the MCMs within the district's boundaries.

Response 78:

The definition of small MS4 includes systems that are owned or operated by districts that have jurisdiction over storm water. Any MUD or WCID that operates a drainage system in Texas that is located wholly or partially within an urbanized area is subject to the small MS4 general permit requirements. The permit does not provide authority for other municipalities to require districts within their boundaries to implement BMPs for a surrounding municipality. However, within an urbanized area, districts must develop and implement a SWMP and apply for permit coverage on their own.

Comment 79:

Lloyd Gosselink expressed concerns on behalf of several MUDs located in Harris County regarding the applicability of the permit to MS4s operated by MUDs in a regulated area. Lloyd Gosselink points out that Harris County currently maintains the storm sewer system for many of these MUDs and that it is not necessary to burden the MUDs with obtaining coverage under the general permit, because Harris County is capable of managing those MS4s and providing an overall SWMP for the area. Based on the definition for "MS4 Operator," which currently includes the phrase "the public entity and/or the entity contracted with the public entity, responsible for the management and operation of," Lloyd Gosselink requests that TCEQ confirm that small MS4s located within urbanized areas are not responsible for obtaining coverage under the permit if they are contracted with a Phase I MS4 to assume operational control of the small MS4. Lloyd Gosselink also suggests that TCEQ include a specific exemption from Phase II MS4 permit coverage for such situations.

Response 79:

If a MUD does not operate the storm drain system, then it would not need permit coverage. However, a MUD is considered a municipality in the TPDES program and would need to apply for permit coverage if it is located in an urbanized area (or is designated by TCEQ) and it retains any operational control over the storm drainage system. If the MUD contracts one or more of the SWMP elements, then it should include that information in its SWMP. If Harris County operates the MS4 that is located within the boundaries of a MUD, then Harris County would be responsible for permit coverage and would include those areas in the SWMP that it developed under its individual MS4 permit.

Comment 80:

Lloyd Gosselink comments that certain permit requirements are redundant for those Phase II MS4s operating within the boundary of a permitted Phase I MS4, who do not enter into an agreement for the Phase I entity to assume operational control over the Phase II MS4s. Lloyd Gosselink states that the permit, as currently written, would require construction site operators within Harris County to submit information to small MS4s operating MS4s in Harris County and the small MS4 operators would be required to review and regulate operations at such construction sites. In addition, construction site operators within Harris County are also required to obtain a storm water permit by submitting site plans for review by Harris County, if the site is located in an unincorporated area. Lloyd Gosselink requests that TCEQ include an

exemption from the construction site runoff control requirements for small MS4s located within the boundaries of a Phase I MS4 when the Phase I entity provides for the regulations and review of construction site operations.

Response 80:

Dischargers of regulated storm water runoff from construction sites must notify an MS4 operator if the discharge is into an MS4, as required in TPDES CGP TXR150000. Construction site operators that are permitted under the CGP, as well as municipal construction site operators that are permitted under this general permit, are required to submit the required documentation to an MS4 operator receiving their discharge. If the storm drain system is operated by a MUD, then the construction site operator must notify the MUD. The MUD, if regulated under this general permit, must develop and implement a construction site run off MCM, which may include specific requirements for discharges from construction sites. A Phase I municipality may have additional requirements for construction activities that occur within its regulated area. If the MUD relies on a Phase I MS4 or other entity to perform some of the requirements related to the MCM, then the MUD must include that information in its SWMP.

Comment 81:

Universal City, HCEC, and TxDOT-Houston request revision of the introductory paragraph to Part II to more precisely indicate that only certain MS4s are regulated under the permit. HCEC added that the change will also indicate that permit coverage is only available for those MS4 operators meeting the criteria. The commenters suggest the following language: "This general permit provides authorization for storm water and certain non-storm water discharges from portions of small municipal separate storm sewer systems (MS4) located inside urbanized areas, or designated small MS4's, to surface water in the state."

Response 81:

TCEQ declines to revise the permit language because the information in Part II.A.1. and A.2 following the introductory paragraph adequately states which MS4s are required to obtain permit coverage.

Comment 82:

HCFCD comments that the language in Part II appears to address only small MS4s that discharge into surface water in the state, and appears to exclude MS4s that discharge into another MS4, such as a Phase I (large or medium) MS4 or another small MS4. HCFCD recommends revising the permit for consistency with discharge permits for Phase I MS4s and to include a provision requiring notification to the MS4 receiving the discharge from an adjacent regulated small MS4.

Response 82:

If an MS4 located within an urbanized area or designated by TCEQ discharges directly into surface water in the state or indirectly through another MS4 conveyance, then permit coverage is required. TCEQ declines to add a requirement to notify an adjacent MS4 because the permit includes a comprehensive public participation program that ensures any adjacent MS4s will have an opportunity to review the application and provide public comments.

Comment 83:

TCCOS and Mathews & Freeland recommend revising the permit to provide authorization for all discharges from regulated MS4s. TCCOS and Mathews & Freeland believe this is appropriate because of the open nature of these municipal systems and because the permit seeks to control the quality of all discharges. TCCOS and Mathews & Freeland comment that because TCEQ has failed to authorize these discharges, operators of these small MS4s are in the untenable position of discharging these flows without the legal protection of a permit as required by the CWA and TWC. TCCOS and Mathews & Freeland request revising the opening paragraph of Part II. as follows: "This general permit provides authorization for discharges from small municipal separate storm sewer systems (MS4) to surface water in the state. The permit contains requirements applicable to all MS4s that are eligible for coverage under this general permit."

Response 83:

Issuing this permit implements federal storm water permit requirements in the State of Texas and would not affect the requirements for other dischargers to an MS4 to obtain permit coverage. TWC, §26.121 prohibits the discharge of certain wastes except as authorized by a rule, permit, or order issued by the commission. The minimum responsibility of the MS4 operator regarding illicit discharges to their system is to comply with the SWMP requirements of this permit to identify and eliminate illicit discharges to their MS4.

Comment 84:

NCTRSW notes that "small MS4" and "MS4" are used interchangeably and requests that "small MS4" be used throughout the permit for consistency.

Response 84:

The definition for "MS4 operator" was revised to clarify that where the permit refers to "MS4 operator," it is referring to an operator of a small MS4 regulated by the permit. Therefore, the term "MS4 operator" was retained in the permit language. Where the term "small MS4 operator" occurred it was revised to "MS4 operator" because, by definition in the permit, this term is referring to a small MS4 operator.

Small MS4s Eligible for Authorization by General Permit

Comment 85:

TxDOT comments that in the preamble to the federal Phase II rules (64 FR 68749), EPA states that "state DOTs that are already regulated under Phase I are not required to comply with Phase II." TxDOT requests that TCEQ consider allowing TxDOT districts with existing Phase I permits the option of incorporating the Phase II areas into their existing Phase I permits. TxDOT notes that this would eliminate duplicate permits for the same general area coverage under existing Phase I permits by the same TxDOT district.

Response 85:

Existing Phase I MS4s in Texas currently operate under individual NPDES or TPDES permits. The MS4 operators regulated under an individual permit may include Phase II areas in an individual permit by submitting a permit application for a major amendment to the existing permit. Adding previously unregulated areas to an individual TPDES permit is considered a substantive change; therefore, a major amendment application is required.

MS4s Located in an Urbanized Area

Comment 86:

TCCOS, Mathews & Freeland, Farmers Branch, Tarrant County, Cleburne, V&E, NCTCOG, Harris County, Freese & Nichols, Dodson, and TAOC request the permit clarify that when an MS4 is partially located within an urbanized area, only the portion within the urbanized area is subject to regulation.

Response 86:

Only the portion of a small MS4 located within the boundaries of urbanized areas are regulated under the Phase II regulations. For example, if a county operates a small MS4 that serves the whole county,

but only one half of the MS4 falls within an urbanized area, then the county must obtain permit coverage only for the portion of the MS4 within the urbanized area. Part III of the fact sheet and Part II.A. of the permit describe the requirements for this situation; therefore, no additional changes were made. TCEQ also revised the permit (see Parts III.A.7., first paragraph of Part VI, and Part VI.A.) to indicate that MS4 operators could implement the optional seventh minimum control measure, related to municipal construction activities, for activities that are located outside of the regulated area, provided that the MS4 operator also implements all other MCMs in those additional areas.

Comment 87:

TCCOS and Mathews & Freeland comment that the provision requiring an MS4 that is fully or partially located within an urbanized area to obtain permit authorization is a statement of general applicability that implements or prescribes law or policy. Therefore, it is a rule that must be adopted using the full rulemaking procedures set out in the Texas Administrative Procedure Act. TCCOS and Mathews & Freeland state that this is a statement of what entities must obtain permit coverage, not a statement of what entities are eligible for coverage. TCEQ should determine what MS4s are required to obtain a permit using full rulemaking procedures to allow for public input.

Response 87:

The requirement regarding what small MS4s are regulated was subject to TCEQ rulemaking when the federal rules were adopted by reference in 30 TAC §281.25. One of the rules adopted was 40 C.F.R. §122.32(a)(1), which states that a small MS4 is regulated if the small MS4 is "located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census."

Designated MS4s and Part II.G. - Designation Criteria

Comment 88:

TCCOS and Mathews & Freeland recommend "that TCEQ use the same criteria and process as used for triggering the development of a water pollution control and abatement plan under TWC §26.177." TCCOS and Mathews & Freeland request revising the permit language in this part to state the following: "The Executive Director may designate additional small MS4 operators as being required to submit applications for authorization to discharge storm water only pursuant to Subchapter B of 30 TAC Chapter 216 (relating to Municipal Water Pollution Control and Abatement)." Cleburne recommends designation criteria that is the same as the criteria triggering the development of a water pollution control and abatement plan under TWC, §26.177 and 30 TAC §216.26. Cleburne suggests the following triggering language: "Any city required to submit a Water Pollution Control and Abatement Program pursuant to 30 TAC §216.26(f)(3) shall be required to submit an application for a TPDES permit for its municipal separate storm sewer system within 180 days after notice of the Commission's action." Cleburne comments that Texas law envisions that municipalities can be forced to regulate the activities of third persons that add pollutants to storm water (such as required by the EPA's Phase II rules) only in the manner specified in TWC, §26.177. The statute, as fleshed out by the rule, sets out the criteria and the procedures used by TCEQ to require municipalities to adopt a program under TWC, §26.177. Cleburne believes that the use of TWC, §26.177 does not appear inconsistent with the requirements of 40 C.F.R. §122.35(b). Cleburne states that if TCEQ chooses to ignore the already legislated designation criteria of TWC, §26.177, then Cleburne suggests the following modifications or clarifications to the language:

The Executive Director may designate any small MS4 operator with a population greater than 10,000 and a population density of 1,000 people per square mile or greater as being required to submit an application for authorization to discharge storm water from the system. Following designation and notification, operators of the small MS4s must obtain authorization under an individual TPDES storm water permit within 180 days. The designation of a small MS4 must occur following a finding that controls of MS4 discharges that do not have an agricultural exemption or coverage under another individual, MSGP, or Construction permit are necessary to protect water quality with consideration for the following factors: 1. Controls for MS4 discharges are determined as necessary for source water protection of public drinking water resources based on the results of source water assessments by TCEQ. 2. Controls for MS4 discharges are necessary to protect sea grass areas of Texas bays as delineated by the Texas Parks & Wildlife Department. 3. Controls for MS4 discharges are necessary to protect receiving waters designated as having an exceptional aquatic life use. 4. Controls are required for pollutants of concern shown to be present in MS4 discharges to a receiving water listed on the Clean Water Act Section 303(d) list based on an approved total maximum daily loading plan.

Response 88:

TCEQ disagrees that TWC, §26.177 as implemented in 30 TAC Chapter 216 is a substitute for developing designation criteria and procedures prescribed in EPA's Phase II storm water rules. The preamble to the adoption of Chapter 216 states that the rules do not apply to those entities covered under the Phase I and Phase II storm water programs, which include "designated" small MS4s. The preamble states that discharges covered by the Chapter 216 rules "address non-permitted sources of water pollution." It further states that NPDES permits and Phase I or Phase II storm water permits "seek to address permitted sources and therefore, would not be duplicated by the §26.177 program" and that the program "seeks to address pollution not covered by a permitting program." (24 TexReg 1622, 1625 (1999)). The final version of Chapter 216 adopted the phrase "pollution attributable to non-permitted sources" to refer to those sources covered by §26.177 and to distinguish them from NPDES and Phase I and Phase II storm water permits, which it specifically notes seek "to address permitted sources." *Id*. at 1626.

Comment 89:

Russell Moorman and Carter & Burgess state that Part II.A.2. does not identify how TCEQ will identify designation criteria as required by 40 C.F.R. §122.35, nor how TCEQ will apply such criteria. Russell Moorman notes that the fact sheet outlines the specific criteria, but that the criteria was not established through a rulemaking process pursuant to Texas Government Code, Chapter 2001. Russell Moorman states that a requirement of general applicability, such as the establishment of designation criteria to identify small MS4s who will be required to obtain permit coverage, can only be obtained through the Chapter 2001 rulemaking process. Russell Moorman states that it is inappropriate for TCEQ to adopt designation criteria through the general permit or in the fact sheet for the permit. Carter & Burgess comments that the federal references at 40 CFR §122.32(a)(2) and 40 CFR §122.26(a)(1)(v) do not actually identify the evaluation criteria to use, rather that 40 CFR §122.32(a)(2) states that a small MS4 can be regulated if it is designated by the permitting authority. Carter & Burgess further notes that 40 CFR §122.26(a)(1)(v) states that certain discharges will be regulated if the discharge contributes to a violation of water quality standards or is a significant contributor of pollutants to waters of the U.S. Carter & Burgess comments that these sections do not address how TCEQ will actually set designation criteria or identify MS4s that will be regulated pursuant to designation criteria. Mathews & Freeland comments that TCEQ's attempt to specify EPA rules as standards is misguided because EPA's rules do not specify any standards or procedures TCEQ could adopt by reference. Mathews & Freeland notes that under EPA's

rules, TCEQ has a specific obligation to develop a process, as well as criteria to evaluate whether a storm water discharge results or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.

Response 89:

TCEQ has the authority to require permitting for any discharge into or adjacent to water in the state that in itself or in conjunction with any other discharge or activity that causes, continues to cause, or will cause pollution of any water in the state (TWC, §26.121). Under TWC, §5.122, a party affected by a permitting decision by the executive director may appeal the decision to the commission. So, the regulatory framework is already in place for TCEQ to regulate a small MS4 that falls outside an urbanized area and who discharges into or adjacent to water in the state with or without any specific designation criteria being specified by TCEQ rules. 40 C.F.R. §122.32(a)(2), which was adopted by reference in 30 TAC §281.25, states that a small MS4 may be regulated if "{y}ou are designated by the TPDES permitting authority . . .." To meet the requirement in §122.32(a)(2), TCEQ developed designation criteria to apply to small MS4s that are not located in urbanized areas and where it was determined that controls were necessary to protect water quality. TCEQ applied the criteria to small MS4s located outside of urbanized areas and determined that no additional small MS4s were "designated" at this time. The criteria used for making a determination whether TCEQ would designate any additional MS4s were:

1. Whether controls for discharges were determined to be necessary for source water protection of public drinking water resources based on the results of source water assessments by TCEQ;

2. Whether controls for discharges were necessary to protect sea grass areas of Texas bays as delineated by the Texas Parks and Wildlife Department;

3. Whether controls for discharges were necessary to protect receiving waters designated as having an exceptional aquatic life use;

4. Whether controls are required for pollutants of concern expected to be present in discharges to a receiving water listed on CWA, §303(d) list based on an approved TMDL plan;

5. If requested by a regulated MS4 operator, that discharges from an adjacent small MS4 were determined by TCEQ to be significant contributors of pollutants to the regulated MS4;

6. Additional factors relative to the environmental sensitivity of receiving watersheds.

EPA did not specify what criteria must be used nor that the criteria be included in the permit. EPA specified only that criteria be developed "to evaluate whether a storm water discharge results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts." (40 C.F.R. §123.35(b)(1)(i)).

Therefore, TCEQ decided not to include specific designation criteria in the permit language. TCEQ evaluated those small MS4s that have a population of at least 10,000 and that are located outside of an urbanized area, and did not designate any additional MS4s based on the results of that evaluation.

Comment 90:

Carter & Burgess asks whether the "portions of the MS4 that are located within the urbanized area . . ." applies to only the geographic area or to outfalls receiving drainage from those areas. Carter & Burgess notes that an MS4 outfall located within an urbanized area may receive most of its drainage from an area that is not within the urbanized area; or an MS4 outfall could be located outside of an urbanized area and receive drainage from the urbanized area.

Response 90:

The permit regulates those portions of an MS4 that are located within an urbanized area or are otherwise designated by TCEQ. The requirements of the SWMP, including mapping all outfalls, only refer to areas located within an urbanized area. Therefore, it is possible that there are outfalls receiving large discharges that do not require mapping and inclusion in the SWMP. However, the elements of the SWMP, including all MCMs, must be implemented for the portion of the MS4 that is located within an urbanized area. At this time, TCEQ has not designated any additional areas for regulation under this permit.

Comment 91:

Cleburne asks if source water assessments currently evaluate storm water runoff from non-agricultural, non-industrial areas to determine if storm water is affecting the drinking water resource. If not, Cleburne believes TCEQ should require these evaluations before designating an MS4 under the justification of protecting public drinking water resources.

Response 91:

Source water assessments do not currently include consideration for storm water discharges. However, before the executive director would designate an MS4 under this criteria, an assessment would be conducted and the results would have to indicate that discharges from the MS4 are contributing to a violation of a water quality standard or is a significant contributor of pollutants in a public drinking water resource to the extent that controls on that discharge are necessary to support and protect that resource.

Comment 92:

Cleburne asks if sea grass areas and exceptional aquatic life use is defined and protected under other federal or state law. Cleburne asks TCEQ to explain how these determinations are made and where they may find information regarding the areas that have been designated. Cleburne states that if "these areas/uses have no protected status then much more information should be included so that MS4 operators clearly understand what information is used in delineating these areas, how determinations will be made on whether MS4 discharges need control, what potential pollutants of concern from an MS4 could cause an MS4 to be designated, and how the MS4 operator can comply with protection of these resources."

Response 92:

Exceptional aquatic life use is a designated use for certain surface waters in Texas that meet the definition in 30 TAC Chapter 307, Texas Surface Water Quality Standards. Discharges authorized under TCEQ and TPDES permits to exceptional aquatic life use designated waters must contain controls and limitations such that this use is maintained and protected. In the proposed 2000 revisions to the Texas Surface Water Quality Standards, TCEQ proposed "sea grass propagation" as a basic use that must be maintained. This revision of the Texas Surface Water Quality Standards was adopted by TCEQ on July 26, 2000; however, portions of the rule are still under review by EPA and FWS. The portion of the rules that was approved includes the definition of "sea grass propagation" as a basic use, but 30 TAC §307.7(b)(5), which relates to the protection of additional uses (including sea grass propagation) has not been approved. The U.S. Army Corps of Engineers, under authority of CWA, §404, may also issue permits that protect sea grass areas. Provisions to protect sea grasses can be developed through the Coastal Zone Management Plan, authorized by the Coastal Zone Management Act of 1972, and administered at the federal level by the Na-

tional Oceanographic and Atmospheric Administration. Texas Parks and Wildlife Department defines certain areas of Texas bays as "scientific areas" and has developed voluntary "no prop zones" to discourage the use of motorboats in areas that could cause damage to sea grasses. Before the executive director would designate an MS4 operator to require a storm water discharge permit under this criteria, the executive director would conduct an assessment and the results would have to indicate that discharges from the MS4 are contributing to a violation of a water quality standard or is a significant contributor of pollutants to this resource.

Comment 93:

Cleburne comments that TCEQ should have to demonstrate that the pollutant(s) of concern are present in MS4 storm water runoff to a §303(d) listed water body and that the runoff is not already under the control of another TPDES permit in order to designate the MS4.

Response 93:

Designation would only occur under this criterion following development of an approved TMDL. Development and implementation of the TMDL would include assessment of sources for the pollutant(s) of concern and also describe the controls necessary in order to restrict that particular pollutant(s) as necessary to attain and maintain the appropriate water quality standards. Designation of small MS4s could occur under this criteria if the TMDL identifies them as a source that requires controls in order to restore the quality of the receiving water.

Allowable Non-Storm Water Discharges

NOTE: This section of the general permit was inconsistently indexed with the rest of the permit. Letters (a) through (r) in the proposed permit should have been numbered 1 through 18. Therefore, this change was made to the permit and the comments that originally referred to a letter were changed to reference the appropriate number. For example, a comment that referred to (e) was changed to match the new indexing number 5.

Comment 94:

TxDOT requests modifying the statement "The following incidental non-storm water sources may be discharged from the MS4 and are not required to be addressed in the MS4s Illicit Discharge Detection and . . ." to "may be discharged into and from the MS4" in the introductory paragraph to Part II.B. in order to establish what discharges are subject to the illicit discharge and detection MCM.

Response 94:

The permit does not authorize discharges into the MS4, but rather discharges from the MS4. However, the permit recognizes that there are non-storm water discharges combined within the system and allows the MS4 operator to discharge those non-storm water discharges without additional requirements, so long as they are not determined by the MS4 operator or the TCEQ to not be a significant contributor of pollutants to the MS4.

Comment 95:

Lloyd Gosselink requests revising the list of allowable non-storm water discharges to include those non-storm water discharges that are expressly allowed under the TPDES MSGP, TXR050000 as well as the TPDES CGP, TXR150000; and TxDOT requests revising the permit to include the same allowable non-storm water discharges as the CGP in order to avoid inconsistencies and conflicts. Lloyd Gosselink states that both the MSGP and the CGP are storm water discharge general permits that include a list of non-storm water discharges that may be included without additional authorization, and both Lloyd Gosselink and TxDOT state those permits include lists of non-storm water discharges that are included, such as fire hydrant flushings, water from the routine external washing of buildings (conducted without the use of detergents or other chemicals), water used to control dust, compressor condensate, and condensate that externally forms on steam lines. Lloyd Gosselink requests that the general permit include a provision that would allow "additional sources of non-storm water that may be listed in 40 C.F.R. §122.26(d)(2)(iv)(B)(1)," which would address any possible additions that are made to the federal rules.

Response 95:

TCEQ agrees that it is appropriate to include non-storm water discharges that are listed in TCEQ's MSGP and CGP, as well as those that are included in the federal rules at 40 C.F.R. §122.26(d)(2)(iv)(B)(1). The permit was revised to include the non-storm water discharges listed in the MSGP, TXR050000, the CGP, TXR150000, and 40 C.F.R. §122.26(d)(2)(iv)(B)(1), on the list of discharges that a small MS4 is not required to address as illicit.

Comment 96:

Harris County, Houston, Missouri City, HCFCD, HCEC, and TxDOT-Houston request adding fire hydrant flushing to the list of allowable non-storm water discharges, alongside "water line flushing" in Part II.B.1. Harris County adds that potable water flushed from lines is often hyperchlorinated, and notes that the flushed water is then discharged to a storm sewer system or other water in the state. Harris County states that acute toxicity in many aquatic animals can occur at concentrations of chlorine of 2.0 milligrams per liter (mg/l) or greater, and requests that the general permit restrict fire hydrant and water line flushings to those that are determined to contain less than 4.0 mg/l, similar to most small wastewater treatment plants. Fort Hood asks whether Part II.B.1., "water line flushing" includes the discharge of super-chlorinated water used for water line disinfection. If not, then Fort Hood requests revising the permit to include a standard that must be met to discharge this type of water. For example, Fort Hood indicated that the permit could require a chlorine residual of less than or equal to 4 parts per million (ppm) in order to allow for a discharge of this type of water into the MS4.

Grand Prairie comments that Part II.B.15. should not exclude test water from fire suppression systems, because doing so would place an undue burden on the community and the regulatory authority. Grand Prairie states that the Uniform Plumbing Code does not require that fire lines drain to a sanitary sewer drain, and that the resultant discharge would result in less than 25 gallons per year, making it infeasible to retrofit the existing systems (estimated cost of $5,000 per facility). Fort Hood also comments that test water from fire suppression systems was excluded, and asks whether those discharges could occur under Part II.B.3., related to discharges from potable water sources, since most tests of fire suppression deluge systems, fire pumps, and even fire trucks discharge potable water.

Response 96:

Because uncontaminated fire hydrant flushing is included in both the MSGP and the CGP, and discharges listed in those permits were added to the list in this permit, it is not necessary to specifically list fire hydrant flushing in this section. TCEQ recognizes that discharges containing chlorine, particularly at levels over 4.0 mg/l, may cause a water quality problem; however, no specific discharge limits were established. No discharge under this permit may cause or contribute to a violation of water quality standards and this provision is not meant to authorize the involuntary discharge of chlorinated water, e.g., from a broken water line. A regulated MS4 operator may need to establish controls to address the discharge of potentially elevated levels of chlorine from these water sources. In addition, while the general permit does include discharges from water line and fire hydrant flushing, it does not in-

clude hyperchlorinated water, unless the water is first dechlorinated. Completely dechlorinated water is generally considered to contain less than 0.1 mg/l of chlorine. In response to the comments, the permit was revised to specify that hyperchlorinated water must be dechlorinated prior to discharge.

Comment 97:

DAFB comments that the term "rising ground waters" used in Part II.B.5. is open to individual interpretations and requests a definition of this term.

Response 97:

The term would generally refer to the upward movement of the water table resulting from recharge to an elevation that would potentially contribute to the flow from the MS4. TCEQ decided not to add a definition of "rising ground waters" to the permit.

Comment 98:

Harris County, Houston, Missouri City, Carter & Burgess, and HCFCD comment that the inclusion of "uncontaminated ground water infiltration" in Part II.B.6. appears to conflict with the definition of "ground water infiltration" and notes that in earlier comments they suggested a revision to the definition that would correct the conflict.

Response 98:

As noted in an earlier comment, the definition of "ground water infiltration" was revised in response to comments to state: "For the purposes of this permit, groundwater that enters a municipal separate storm sewer system (including sewer service connections and foundation drains) through such means as defective pipes, pipe joints, connections, or manholes." Therefore, additional changes are not required to this definition.

Comment 99:

NCTCOG requests clarification whether it is the intent of TCEQ to require the prohibition of individual residential car washing under the permit listed in Part II.B.11. NCTCOG notes that the only mention of an individual non-storm water discharge in the NPDES draft general permit is "individual residential car washing," which is included in the list of allowable non-storm water discharges. NCTCOG requests that the permit include a specific provision prohibiting any individual non-storm water discharge determined to contribute significant amounts of pollutants to the MS4.

Response 99:

Contributions to the permitted MS4 resulting from residential vehicle washing are allowable and are included in the list of allowable non-storm water discharges in Part II.B. of the permit. The MS4 operator would be required to prohibit this contribution to the storm sewer system only if the MS4 operator determines it is a significant source of pollutants to the permitted MS4.

Comment 100:

DAFB requests a definition of the term "dechlorinated" as used in Part II.B.13., referring to "dechlorinated swimming pool discharges." DAFB asks what concentration of chlorine is required in order to achieve dechlorination and if a technology-based standard for treatment is used, DAFB asks what technology is appropriate. GCHD comments that many municipalities forbid dechlorinated swimming pool discharges by local ordinance and testing is required for enforcement. Fort Hood recommends that the permit include a standard for chlorine residual, such as a maximum of 4 ppm, rather than require total dechlorination of all swimming pool discharges.

Response 100:

Water is generally considered dechlorinated if it contains less than 0.1 mg/l of chlorine. It is possible to measure this level of concentration with relatively inexpensive test kits and it is commonly included as the standard in TPDES wastewater permits for discharges of dechlorinated effluent from municipal treatment works. This provision of the permit would allow dechlorinated swimming pool discharges to occur and not require the MS4 to address the activity in the illicit discharge and detection MCM of the SWMP, provided that the MS4 determines it is not a significant source of pollutants. However, the MS4 may also develop requirements or ordinances that forbid swimming pool discharges to the MS4. For example, the MS4 could require that swimming pool water register "non-detect" for chlorine utilizing a common pool chemical test kit or that the water must be held a minimum of 48 hours prior to discharge. TCEQ declines to add chlorine residual discharge limits to the permit.

Comment 101:

DAFB requests a definition of "swimming pool" as used in Part II.B.13. and wants to know whether the term include children's wading pools.

Response 101:

TCEQ declines to add a definition for "swimming pool," and notes that for purposes of this permit, the term "swimming pool" may include a pool primarily used for wading.

Comment 102:

Carroll & Blackman comments that Part II.B.11. should include charity vehicle washing, which is allowed under Phase I MS4 permits. Fort Hood asks whether the permit allows the discharge of wash water from charity, fund raising, or other organized car washing events if they are reviewed by the MS4 operator and deemed an insignificant source of pollutants into the MS4. Dodson asks whether charity car washes at local grocery stores are considered an illicit non-storm water discharge.

Response 102:

TCEQ recognizes that some Phase I MS4 permits may include charity car washes in the list of non-storm water discharges that a Phase I MS4 operator may not have to consider as illicit. However, charity car washes are not specifically listed in the federal regulations or in existing storm water general permits, and TCEQ declines to revise the list to include such discharges. The example of charity car wash activities might be included in this category and then listed under Part III.A.3.(b), where the MS4 operator is able to identify and require controls that are protective of receiving water quality. However, based on local water quality concerns, this also might be an activity that the MS4 operator would either encourage or require to occur with the cooperative assistance of local commercial car wash enterprises where the wastes are routed to a treatment works. Charity car washes are not included in the list of non-storm water discharges; therefore, the MS4 operator would need to determine whether it could be included under item (r) related to similar discharges and then listed and considered under Part III.A.2.(b).

Comment 103:

Harris County, Houston, Missouri City, HCFCD, HCEC, and TxDOT-Houston comment that an earlier draft permit contained the following item, which was removed in the current version: "(n) {14} pavement and exterior building wash water conducted without the use of detergents or other chemicals." The commenters request adding this section back to the permit because this category is listed in Part VI.B.3.

Response 103:

Pavement and exterior building wash water was removed from the original draft permit because they are not specifically listed in the federal rules as a non-storm water discharge that do not require consideration

as an illicit discharge. However, since the non-storm water lists from the TPDES CGP and MSGP are now incorporated into the permit, certain pavement and other wash water are included in Part V.B.3. for consistency with the other storm water general permits. Accordingly, no additional revisions were made to the Part II.B. of the permit.

Comment 104:

Fort Hood requests clarification of the term "street wash water" and specifically asks whether the term applies only to street sweepers that use water, or to any kind of street, sidewalk, or parking lot washing. Fort Hood also asks whether the term includes other methods of washing, such as pressure washing or using a potable water hose. Grapevine notes that it supported the changes to Part II.B.14., and states that the addition of "street wash water" will provide for more effective and efficient routine maintenance and cleanup of street surfaces.

Response 104:

Street wash water applies to the use of water to rinse off streets, and may also include residual water that is not vacuumed into a street sweeper. As discussed in previous responses, the permit was revised to include other wash waters that are listed in the MSGP and the CGP; therefore, other pavement wash waters may also be discharged under this provision. Pressure washing could be included as an authorized non-storm water discharge in accordance with Part II.B.18., unless it is determined to contribute significant levels of pollutants to the MS4.

Comment 105:

GCHD comments that pavement washing at gas stations, for example, is a substantial source of pollutants to the MS4 and MS4 operators are responsible for determining these sources and controlling the discharge of pollutants to their MS4. GCHD comments that the permit should address these sources individually and not cover them under a blanket category of pavement washing.

Response 105:

The permit allows certain pavement washing to occur if it is conducted without the use of detergents and other chemicals. This is also allowed in the MSGP and the CGP. If an MS4 operator determines that pavement washing activities at gas stations are a significant contributor of pollutants, then the MS4 operator should address pavement washing when developing their SWMP and, to the extent possible, through local ordinances or other methods to control those activities. Conversely, the permit does not require an MS4 operator to address an activity as an illicit discharge and detection control measure if the MS4 operator determines it is not a significant contributor of pollutants.

Comment 106:

Part II.B.15. states that fire fighting water does not include washing of trucks. Grand Prairie states that its fire stations were built in the 1970s, and are not equipped with wash bays, which would cost approximately $250,000 each. Grand Prairie states that it does not have the option to wash the trucks in grassy areas due to weight, and that it cannot move the trucks to another location for washing due to safety concerns with having the trucks unavailable for emergencies. Fort Hood comments that most fire stations do not have a vehicle washing facility with a grit trap or oil-water separator that drains to the sanitary sewer system and adds that it may take vehicles out of their districts for vehicle maintenance, which would increase response time. Fort Hood suggests allowing the discharge of water from the external rinsing of trucks, using potable water only, with no detergents or cleaners. Fort Hood agrees that cleaning heavily soiled trucks should be done at an appropriate facility permitted to discharge wash water.

Response 106:

The only vehicle washing water that is specifically included in the federal storm water rules related to non-storm water discharges is individual residential vehicle washing. The only wastewater related to fire protection activities included in the federal MS4 rules are discharges related to actual fire fighting activities. TCEQ declines to revise the list to include truck wash water. However, based on local water quality concerns, washing fire trucks may be an activity that the MS4 operator determines is not a contributor of significant pollutants based on the nature of the discharge being similar to those on the list, or based on controls that are placed on the discharge to ensure that it is protective of receiving water quality.

Comment 107:

Fort Hood asks whether runoff from fire fighting training activities that only use potable water, which are excluded under Part II.B.18, are allowed as a discharge from potable water sources under Part II.B.3. If the discharges are not allowed, then Fort Hood requests guidance regarding how to handle the water and notes that fire fighting training could be a high volume activity that is not economically feasible to dispose of in any other way than a direct discharge.

Response 107:

The permit does not authorize runoff from fire fighting training activities as an incidental non-storm water discharge. Where these activities occur without the use of chemicals, an MS4 may evaluate the discharge and determine that it qualifies as an incidental non-storm water discharge under Part II.B.18. If any chemicals are included in the fire training activities or if the MS4 operator has not identified runoff from fire training activities under Part II.B.18., then the water must be disposed in a sanitary sewer system or other authorized means.

Comment 108:

Regarding Part II.B.15., Fort Hood comments that National Fire Protection Agency guidelines require quarterly testing of foam systems on vehicles, plus requiring testing every ten years on fixed fire suppression systems on vehicles that use foam. Fort Hood asks whether TCEQ expects MS4 operators to collect and dispose of this water (which contains foam additives such as Aqeuous Fire Fighting Foam, or AFFF) and asks about the proper disposal method if such discharges are not allowed. Fort Hood states that publically owned treatment works may not accept AFFF into their systems because of potential foaming or possible toxicity to microorganisms in their wastewater treatment facilities.

Response 108:

An MS4 operator may not discharge a non-storm water that contains chemicals under this provision. If the operator of a sanitary sewer system will not accept this waste, then the discharger must insure proper disposal consistent with solid waste disposal regulations.

Comment 109:

Group 1 requests that TCEQ add an item Part II.B.16. to the list of allowable non-storm water discharges that reads: "Other discharges as determined by the permittee to not contribute significant pollutants to the MS4 or waters of the United States." Group 1 also comments that this is consistent with Phase I individual MS4 permits and allows flexibility for MS4s to determine additional non-storm water sources that do not represent a contribution of pollutants to the system. TxDOT requests adding "other similar occasional incidental non-storm water discharges" to the list of acceptable discharges in order to agree with Part III.A.3(c) of this permit and to expand the language in Part II.B.14. to include not only pavement and exterior building wash water, but also "other impervious surfaces." Harris County requests the addition of a

new subsection for "noncommercial car washing" to allow non-storm water discharges related to fund-raising car washes in small MS4s.

Response 109:

The allowable non-storm water discharges listed in this permit are consistent with 40 C.F.R. §122.34(b)(3)(iii). The only vehicle washing water that is specifically included in the federal storm water rules related to non-storm water discharges is individual residential vehicle washing. As discussed in a preceding response, the language regarding non-storm water discharges was revised to include non-storm water discharges that are listed in the TPDES MSGP, TXR050000, and the TPDES CGP, TXR150000. TCEQ declines to add additional items to the list of allowable storm water discharges because this would potentially allow discharges that have an adverse impact on water quality. Part III.A.3.c. of the permit, Incidental Non-Storm Water Discharges, allows the MS4 operator to develop a list of occasional incidental non-storm water discharges that are not addressed as illicit discharges.

In developing an incidental non-storm water list, the MS4 operator will determine that the nature of the listed discharges are not reasonably expected to be a significant source of pollutants due to the nature of the discharge or the conditions that are established for allowing the discharges. Alternatively, the MS4 operator may determine that the discharge is not a significant source of contaminants if certain conditions are met. In the latter case, the requirements for the activity are included in the SWMP. For example, the MS4 operator could determine that a certain activity is not a significant source of pollutants if the use of detergents is prohibited. The MS4 operator would then list the activity and requirements for its use in their SWMP as an occasional incidental non-storm water discharge that is not addressed as an illicit discharge.

Comment 110:

Carter & Burgess comments that the permit does not define "similar occasional non-storm water discharges," and Fort Hood requests a definition or further explanation of the term. Grapevine notes its support of the changes to Part II.B.16. and states that the changes will allow for more effective local and state control in addressing specific discharges, because this section will now allow entities to respond to unforseen issues.

Response 110:

The list of discharges in Part II.B.18. does not include discharges that contain detergents, soaps, or other chemicals (except as typical of residential vehicle washing), discharges that are hyperchlorinated, and discharges that contain elevated levels of pollutants, including temperature. The purpose of this list is to allow the discharge into the MS4 of relatively common discharges with low levels of pollutants without the MS4 operator addressing them in an illicit discharge program.

Comment 111:

Lubbock comments that agricultural storm water runoff is not included in the list of allowable non-storm water discharges.

Response 111:

Agricultural storm water discharges are exempted by the CWA from NPDES permitting. Therefore, those discharges are not considered illicit discharges and it was not necessary to regulate or authorize agricultural storm water discharges under this permit.

Limitations on Permit Coverage

Comment 112:

Lloyd Gosselink comments that the permit does not provide a release of liability for spills or events that are beyond the control of a regulated MS4, including spills caused by third parties, intentional spills to prevent the loss of life, personal injury or severe property damage, and any spills attributable to *force majeure*. Lloyd Gosselink notes that a *force majeure* defense is provided for in TCEQ rules at 30 TAC §70.7, when an event occurs that is otherwise a violation of a permit if the event was caused solely by an act of God, war, strike, riot, or other catastrophe. Lloyd Gosselink requests that the permit include language similar to the language that is included in Phase I individual MS4 permits, and also requests that the general permit specify that MS4 operators are not liable for spills caused by third parties or intentional spills to prevent the loss of life, personal injury, or severe property damage.

Response 112:

In response to the comment, a new Part II.C.9. was added to the permit. It reads:

9. Other

Nothing in Part II. of the general permit is intended to negate any persons ability to assert the force majeure (act of God, war, strike, riot, or other catastrophe) defenses found in 30 TAC §70.7.

This permit does not transfer liability for the act of discharging without, or in violation of, a NPDES or a TPDES permit from the operator of the discharge to the permittee(s).

Discharges Authorized by Another TPDES Permit

Comment 113:

NCTCOG and Farmers Branch comment that the "NPDES permit requires that an MS4 covered by an individual permit provide the total square miles of the system if seeking coverage under the general permit and this permit does not." NCTCOG and Farmers Branch want to know whether that difference is intentional.

Response 113:

The federal storm water rules adopted by TCEQ in 30 TAC Chapter 281 require the operator of a regulated small MS4 who is applying for an individual permit and "wishes to implement a program under §122.34" to provide an estimate of the total square mileage served by the MS4 (40 C.F.R. §122.33(b)(2)(i)). Those small MS4 operators applying for coverage under a general permit are not required to estimate the square mileage of their MS4 (40 C.F.R. §122.33(b)(1)). TCEQ is following the federal requirements and is not requiring this information in NOIs for coverage under this permit. However, if applying for an individual permit, an MS4 operator is required to provide the square mileage of its MS4.

Comment 114:

Harris County requests that TCEQ provide examples of discharges that are normally authorized under another TPDES permit that this permit may authorize. As an example, Harris County asks if wastewater treatment plants can be authorized. Harris County also asks how any applicable effluent limitations or other permit provisions are incorporated to ensure that the discharges are protective of human health and the environment. Harris County recommends removing the broad language of this provision and revising the general permit to include more specific language regarding what TPDES permits can be "rolled" into this MS4 permit.

Response 114:

This permit authorizes discharges from certain small MS4s and includes a list of certain non-storm water discharges that are not necessarily considered illicit. No discharge of any other wastewater or storm water other than those listed are authorized by this permit. This section of the general permit would allow the authorization of discharges

from small MS4s that are authorized by another general permit (if one is available) or by an individual permit.

Discharges of Storm Water Mixed with Non-Storm Water

Comment 115:

Group 1, TCCOS, and Mathews & Freeland comment that the introduction of non-storm water to storm water runoff occurs in virtually every storm sewer collection system, but the permit language deems these discharges as non-authorized discharges that are automatically violations of the CWA by the MS4 operator. The prohibition of illicit discharges is clearly identified within the SWMP requirements and it is clear that the MS4 operator has a legal responsibility to identify and eliminate these types of discharges to the MEP as a part of implementation of the SWMP. They request deletion of this paragraph in Part II.C.2.

Response 115:

The language of this section does not automatically place the MS4 operator in violation of the CWA. It is the non-storm water discharger who is responsible for compliance with the CWA, while the small MS4 operator is responsible for reducing pollutant discharge to the MEP.

Compliance with Water Quality Standards

Comment 116:

Carter & Burgess comments that there is no time frame in Part II.C.3. for revising the SWMP to comply with any future changes in the Texas Surface Water Quality Standards or future TMDLs.

Response 116:

TMDLs that require action by storm water dischargers will either contain information in the TMDL regarding a time line to revise the SWMP or TCEQ will initiate an amendment to the general permit or to an individual authorization to require additional controls. If the Texas Surface Water Quality Standards in 30 TAC Chapter 307 are revised, then TCEQ may amend this general permit if necessary to comply with any new provisions in the rule and any supporting implementation procedures.

Discharges to Water Quality Impaired Receiving Waters

Comment 117:

V&E requests revising the last sentence in Part II.C.4. to replace the word "constituents" with "pollutants." Carter & Burgess comments that this provision should refer to "constituents of concern" rather than just "constituents."

Response 117:

A "constituent of concern" is the specific pollutant that may cause listing of a body of water on the CWA, §303(d) list because it does not meet applicable water quality standards. In response to the comments, the first sentence of the second paragraph, the term "constituent(s)" was replaced with "constituent(s) of concern."

Comment 118:

Lloyd Gosselink and Carter & Burgess request clarification regarding what types of discharges of constituents of concern to impaired waters are not authorized by the permit and ask whether the permit is referring to discharges of constituents of concern to impaired waters that begin after the effective date of the permit. TCCOS and Mathews & Freeland believe that TCEQ should either allow operators of small MS4s that discharge pollutants of concern to CWA, §303(d) listed segments to use the permit or clearly state that they are not eligible. TCCOS and Mathews & Freeland request deleting or modifying this provision to clearly identify the class of small MS4s that may not be eligible for coverage and include a requirement for these small MS4s to demonstrate that their selected BMPs are designed to control discharges of pollutants of concern. TCCOS and Mathews & Freeland recommend the use of the following language: "Operators of small MS4s that discharge constituent(s) of concern to impaired waters are not authorized by this permit unless the SWMP documents how discharges of pollutants of concern are controlled. Impaired waters are those that do not meet applicable water quality standard(s) and are listed on the CWA §303(d) list. Constituents of concern are those for which the water body is listed as impaired."

Universal City, HCEC, and TxDOT-Houston comment that the permit does not authorize new discharges containing constituents of impairment to CWA, §303(d) listed waters. They comment that this provision inappropriately forces small MS4 operators that may discharge constituents of concern to impaired water bodies to apply for individual permit coverage to avoid an automatic violation provision. Universal City recommends including a provision in the general permit prior to the completion of a TMDL Implementation Plan, allowing new discharges to impaired water bodies, providing the SWMP acknowledges the impairment and outlines BMPs to address the pollutant(s). HCEC and TxDOT-Houston and Universal City added that the permit should include a stepped approach, or a compliance schedule, so that new discharges could be authorized if the operator's SWMP addresses the impairment and discusses measures that will be taken to address the pollutant(s) of concern. HCEC, TxDOT-Houston, and Universal City added that following completion of a TMDL implementation plan, the provisions in the second paragraph are appropriate, as long as the operator is allowed 90 days to conform to the implementation plan requirements.

Universal City, Carter & Burgess, HCEC, and TxDOT-Houston comment that the second paragraph does not include a timeline for SWMP modification after completion of any future TMDLs. Universal City and TxDOT-Houston suggest allowing 90 days and HCEC suggests allowing 180 days to modify the SWMP to comply with the TMDL implementation plan. Universal City, HCEC, and TxDOT-Houston want to require MS4 operators discharging to waters with existing implementation plans to comply immediately. Travis County asks whether this provision would require Travis County to apply for and obtain an individual permit for any new MS4 discharges in the urbanized areas that drain to impaired waters in the area, such as Gilleland Creek, Onion Creek, Eanes Creek, Slaughter Creek, and Bull Creek.

Response 118:

40 C.F.R. §122.4(i) prohibits issuing a permit "to a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." Existing discharges from small MS4s otherwise eligible for authorization under the conditions of the permit would not constitute a new source or a new discharger to a currently listed water body and therefore are eligible for coverage. When a TMDL is developed for a listed receiving water, existing sources may continue with discharge authorizations. New sources may be authorized if the discharge falls within the provisions of the approved TMDL and TMDL implementation plan for the listed receiving water. If the TMDL or implementation plan contains provisions or conditions specific to the discharges otherwise eligible for coverage under the permit, MS4s may then either include those provisions or conditions as a part of the SWMP and remain authorized under this permit or apply for authorization under an individual TPDES permit. A timeline was not added to the permit, but may be included in a TMDL and TMDL Implementation Plan.

Comment 119:

TCCOS, Mathews & Freeland, Lloyd Gosselink, Carter, Russell Moorman, and Carter & Burgess comment that the permit does not define

"new sources" or "new discharges" and therefore makes the applicability of this provision unclear due to the ambiguity of the terms. Lloyd Gosselink and Russell Moorman note that the TAC does not contain a definition for "new discharges," but that 30 TAC §305.2(23) does define "new source" and, based on that definition, the term does not apply to storm water discharges. Lloyd Gosselink and Carter & Burgess further state that discharges from MS4s should not be considered either "new sources" or "new discharges" because storm water was discharging from these MS4s long before storm water permitting requirements existed. Lloyd Gosselink and Russell Moorman comment that, while the EPA has promulgated standards for multiple categories of sources, it has not promulgated standards pursuant to CWA, Chapter 306 for storm water discharges from MS4s, and therefore, the term "new source," as defined in 30 TAC Chapter 305, would not apply to storm water discharges from the small MS4s regulated under this general permit. Lloyd Gosselink requests that TCEQ clarify the applicability of this section to regulated small MS4s. TCCOS and Mathews & Freeland believe these terms would apply to discharges from new outfalls constructed during the permit term and may not authorize outfalls constructed after 1979. Carter & Burgess comments that the permit does not make clear what types of discharges of constituents of concern to impaired waters are not authorized by the permit, and asks whether the permit is referring to discharges of constituents of concern to impaired waters that begin after the effective date of the permit.

Response 119:

TCEQ rules at 30 TAC §305.2(22) and (23) define "new discharger" and "new source." As discussed in the preceding response, existing discharges from small MS4s otherwise eligible for authorization under the conditions of the permit would not constitute a new source or a new discharger, and therefore are eligible for coverage under the general permit. The language in the permit regarding discharges to impaired waters is consistent with the procedures developed and conditionally approved by EPA to implement Texas Surface Water Quality Standards for discharges to impaired waters (2002 *Procedures to Implement the Texas Surface Water Quality Standards, Publication Number RG-194* , developed by the TCEQ Water Quality Division).

Comment 120:

Carroll & Blackman comments that there is confusion regarding how TMDL Implementation Plans and the MS4 general permit will work together, especially after an implementation plan is approved. Carroll & Blackman states that if a TMDL implementation plan indicates that storm water or non-point sources are contributing sources to the impairment and the approved TMDL implementation plan requires storm water sampling, will the requirement to sample storm water become a requirement of the SWMP or the Phase II MS4 general permit. Carroll & Blackman asks whether this sampling requirement would automatically become a permit condition, or would sampling remain only a TMDL implementation plan requirement. Carroll & Blackman also asks whether the sampling is a reportable activity under the general permit.

Response 120:

If a TMDL or TMDL implementation plan have specific sampling requirements for storm water covered by this permit, a discharger could retain coverage under this permit and meet the terms and conditions of the TMDL by incorporating the requirements into its SWMP. This would also include requirements to sample discharges from the MS4 if that were a specific condition of the TMDL or TMDL implementation plan. A violation of the TMDL and implementation plan would then be considered a violation of the SWMP. It is also possible that TCEQ could determines that meeting the requirements of the TMDL or TMDL implementation plan would not be appropriately addressed under a general permit and require individual TPDES permit coverage. It is also possible that after allowing incorporation of the requirements into the SWMP continued violations by an MS4 operator of those requirements could trigger TCEQ to require the MS4 operator to apply for coverage under an individual TPDES permit.

Discharges to the Edwards Aquifer Recharge Zone

Comment 121:

Carroll & Blackman asks whether the requirement to include copies of the water pollution abatement plans (WPAPs) refer only to WPAPs owned or controlled by the MS4 operator, or does it refer to all WPAPs within the city's MS4 or urbanized area. Carroll & Blackman states that requiring the submission of all WPAPs would result in a significant amount of effort by the MS4 operator and would require TCEQ assistance in identifying all of the WPAPs within a regulated area.

Response 121:

The requirement to attach or reference the WPAP refers to any that are under the responsibility of the MS4 operator.

Discharges to the Edwards Aquifer Recharge Zone and Discharges to Specific Watersheds and Water Quality Areas

Comment 122:

TCCOS and Mathews & Freeland comment that it is unclear how the permit and the provisions of 30 TAC Chapters 213 and 311 interact. TCCOS and Mathews & Freeland believe that TCEQ should strive for clarity in the permit, particularly with regard to eligibility. TCCOS and Mathews & Freeland state that these separate water quality programs will be impaired if TCEQ adopts a general permit that does not expressly recognize their existence. TCCOS and Mathews & Freeland request the deletion of these provisions from the permit, or that TCEQ develop specific general permits for MS4s located in these regions that better address their unique requirements.

Response 122:

The requirements of 30 TAC Chapter 213 (relating to the Edwards Aquifer) and of 30 TAC Chapter 311 (relating to Watershed Protection) are separate from the provisions and requirements of this permit. However, because both rules regulate discharges that are common to operators of MS4s, they are referenced in the permit. Operators must review these regulations to determine if any restrictions or prohibitions would affect planned discharges. Additionally, programs established to comply with the storm water discharge requirements from 30 TAC Chapter 213 may be referenced in the SWMP of a small MS4 and utilized to satisfy certain requirements of this permit.

Comment 123:

Travis County asks whether discharges in the Edwards Aquifer Recharge Zone must meet both the requirements of the general permit as well as the requirements of 30 TAC Chapter 213.

Response 123:

The Edwards Aquifer Rules at 30 TAC Chapter 213 are state-only rules specific to TCEQ and are separate from TPDES permitting requirements. However, both the Edwards rules and TPDES permitting requirements must be met for discharges in the Edwards Aquifer Recharge Zone.

Obtaining Authorization

Comment 124:

V&E and Harris County request the opportunity to review and comment on the NOI for the MS4 general permit before the permit is issued.

Response 124:

The NOI form is not part of the permit and is not subject to public notice requirements and the formal comment period.

Application for Coverage

Comment 125:

NCTCOG and Farmers Branch ask if the SWMP is approved during the period of provisional authorization immediately after the NOI is submitted and whether implementation of the SWMP is compliance with the permit. Grapevine expressed concern over when the discharge authorization will begin for regulated MS4s and states that discharges may be considered unauthorized during the time frame between submitting an NOI and TCEQ approval. Mathews & Freeland comment that it appears that operators of regulated small MS4s will not obtain coverage under the permit until after the applicant: 1) receives notice from TCEQ that the NOI and SWMP have been administratively and technically reviewed, and 2) the public participation requirements are complete.

Response 125:

To address a partial remand of the Phase II rules by the 9th Circuit Court of Appeals, in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), several changes were made to the permit, including TCEQ review of the SWMP. The 9th Circuit held that the SWMP should be reviewed by the permitting authority, so TCEQ is conducting a technical review of the NOI and SWMP, prior to authorizing a discharge under the permit. Therefore, the permit was revised to eliminate provisional authorization within a fixed time frame after the NOI is submitted. The permit establishes a deadline of 180 days to submit an NOI and SWMP, and authorization to discharge under the terms of the permit will begin when TCEQ provides written notification to the MS4 operator that the NOI and SWMP are approved.

During the NOI and SWMP review process, TCEQ may determine that revisions or additions are required. Because full implementation of the SWMP is expected within five years after the permit is issued, any required changes will likely be established as part of the five-year period. If the MS4 operator meets the deadlines required in the general permit, then enforcement actions are not anticipated. However, if the MS4 operator did not submit an NOI and SWMP within the specified time frame, if the SWMP lacks any of the required MCMs, or if the SWMP does not contain a reasonable schedule for full implementation, then it is possible that violations could be issued before TCEQ completes full review of the SWMP. Implementation of the SWMP is required upon receipt of written approval from TCEQ. In response to the comments, a sentence was added to the end of the first paragraph of Part II.D.3., which states: "Implementation of the SWMP is required immediately following receipt of written authorization from the TCEQ."

Comment 126:

Harris County, Houston, Missouri City, Carter & Burgess, and HCFCD comment that Part II.D.1. does not contain a time frame for TCEQ to conduct review of the application. Harris County, Houston, and Missouri City request revising the permit to state that, unless denied by the executive director within 60 days, an NOI and/or SWMP is considered acceptable and deemed approved by the commission. Carter & Burgess suggests a 60-day time frame for making the determination. Euless asks how long the administrative and technical review will take, and whether there will be any compliance requirements during this time for the regulated MS4s. Harris County, Houston, Missouri City, and HCFCD make a similar comment with regards to Part II.D.12.(a) of the permit, and specifically request adding the following sentence to the general permit in Part II.D.12.(a): "The Executive Director has 60 days to review and respond to the applicant."

Response 126:

TCEQ declines to place an automatic approval deadline in the permit because the remand of a portion of the Phase II rules by the 9th Circuit in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003) mandated that the permitting authority review the NOI and SWMP prior to authorization. TCEQ will strive to review and respond to applications within 60 days of receipt, provided there are no issues with the NOIs and SWMPs that require additional information from the regulated MS4s.

Comment 127:

Mathews & Freeland comment that the permit does not clearly indicate that TCEQ will be reviewing and determining if the SWMP submitted by the operator of the small MS4 meets the MEP standard and effectively prohibits non-storm water discharges. Mathews & Freeland notes that the 9th Circuit in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003) held that the permitting authority must review all SWMPs and expressly determine whether the SWMP meets the permitting standards. The draft permit states that TCEQ will review both the NOI and the SWMP, but will only determine the "completeness" of the NOI and does not commit TCEQ to determine whether the SWMP also meets the permitting standards.

Response 127:

Part II.D.1. states that TCEQ will technically review the SWMP prior to authorizing discharges under the permit. The introductory paragraph of Part III added language in response to comments to more accurately reflect the requirements in the federal rules and now states that a regulated small MS4 must develop an SWMP "to reduce the discharge of pollutants from the MS4 to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act and the Texas Water Code." Since the permit explicitly requires the SWMP to meet the MEP standard, TCEQ authorization of the discharge after technical review constitutes a finding by TCEQ that the SWMP meets the MEP standard.

Comment 128:

V&E requests confirmation that an MS4 operator who operates multiple discontinuous (i.e., not interconnected) MS4s is required to submit only one NOI for MS4 general permit coverage and prepare only one SWMP that addresses these multiple MS4s.

Response 128:

The permit requires each MS4 operator within an urbanized area to submit a separate NOI. If an MS4 extends over more than one urbanized area, then the MS4 operator is required to submit only one NOI. For example, the operator of an MS4 associated with state highways and roads is the applicable district office of TxDOT. In this case, it is appropriate for each TxDOT district office to submit one NOI to TCEQ for each of the regulated portions of the MS4 located in the district.

Comment 129:

Carter & Burgess comments that item 2), in the middle of the second paragraph of Part II.D.1., should include "and SWMP" so that the item reads as follows: "2) determine the NOI and SWMP are incomplete and deny coverage . . .."

Response 129:

In response to the comment, item 2) in Part II.D.1 was revised as follows: "2) determine the NOI and/or SWMP are incomplete and deny coverage until a complete NOI and/or SWMP are submitted . . .."

Comment 130:

TxDOT requests that the permit include an address for submitting NOIs and that the permit specify whether to send the NOI to TCEQ's central or applicable regional office. TxDOT also notes that the permit does include similar information for the WPAPs associated with the Edwards Aquifer.

Response 130:

In response to the comment, the following sentence was added to Part II.D.1.: "The applicant must submit the original and one copy of the NOI and SWMP to the TCEQ Water Quality Division at the address specified on the NOI form."

WPAPs required by the Edwards Aquifer Protection Program may be either submitted with the NOI and SWMP or referenced in the SWMP. TCEQ recognizes that some information in the WPAP may be similar to the requirements of the SWMP, but the documents originate from different programs and both must be developed if the MS4 is located in an area that is regulated under TCEQ's Edwards Aquifer rules at 30 TAC Chapter 213.

Comment 131:

NCTRSW and Grapevine note their support of the revised application deadline from 90 days to 180 days, and note that it will provide regulated small MS4s more time to comply with the added public notification requirements. Mathews & Freeland thinks the 180-day time frame is achievable for most regulated small MS4s and comments that TCEQ should provide additional assistance to regulated small MS4s if help is needed to achieve this deadline.

Response 131:

This change was made following the 2002 public notice period and receipt of EPA guidance regarding new public participation requirements for the Phase II MS4 program.

Comment 132:

Fort Hood asks whether this permit would apply to leased, residential areas within an urbanized area, where the storm drain system is operated and maintained by a partnership between a federal agency and a private business, and whether the entities are required to submit an NOI and SWMP.

Response 132:

In the case of shared operational control, all public entities with operational control over the storm sewer system must submit an NOI and SWMP. Because operators of MS4s must obtain coverage, there may be cases where a private entity that actually shares operational control or ownership of a small MS4 would also have to apply for separate coverage. In this case, it is expected that some or all of the SWMP will be identical to the other entity, and TCEQ encourages shared elements be utilized where possible.

Comment 133:

Mathews & Freeland note that an applicant must follow the public notice and availability requirements in the permit and that TCEQ lacks the authority to impose these requirements through a general permit. Mathews & Freeland state that such provisions may only be implemented by formal rulemaking and recommend deleting the introductory provision in Part II.D.1.

Response 133:

TCEQ disagrees that a general permit may not include public notice and availability provisions. The general permit rule provisions in 30 TAC Chapter 205 allow flexibility in what requirements may be included for coverage under a general permit. 30 TAC §205.4(a) states that a "qualified discharger may obtain authorization to operate under a general permit by complying with the general permit's conditions for gaining coverage." These conditions are presumed to include public notice and availability provisions at the discretion of TCEQ. For example, see the concentrated animal feeding operation general permit, TXG920000, issued in July 2004, which contains similar public notice and availability provisions for new and significantly expanding operations.

Application For Coverage and Storm Water Management Program (SWMP)

Comment 134:

Lloyd Gosselink and Carter & Burgess comment that the federal storm water rules do not require regulated small MS4s to submit their SWMP, and state that the requirement discussed in Part II.D.1. and II.D.3. of the general permit is more stringent and more burdensome to the regulated small MS4s. The commenters request revising the provision for consistency with the federal regulations at 40 C.F.R. §122.33(b)(1) that only require submitting an NOI and information on BMPs and measurable goals.

Response 134:

The requirement to submit the SWMP is consistent with the federal regulations. If seeking coverage under a general permit, 40 C.F.R. §122.33(b)(1) requires submitting an NOI "that includes the information on your best management practices and measurable goals required by §122.34(d)." The referenced section requires BMPs for each of the six MCMs, the measurable goals and milestones for each BMP, and identification of the person or persons responsible for developing and implementing the plan. These requirements are a general description of the SWMP. Finally, 40 C.F.R. §122.33(b)(1) concludes with the statement that the general permit will explain any other steps necessary to obtain permit authorization, and this permit requires that the actual SWMP be submitted in order to facilitate a detailed review of the program prior to approval of authorization under the permit. TCEQ elected to require the MS4 operator to submit the SWMP when the NOI is submitted. TCEQ recognizes MS4 operators will continue making revisions and additions throughout the permit term. These changes must be included in the required annual report and proposed according to the requirements of the permit.

Comment 135:

Carroll & Blackman requests that TCEQ provide information regarding how TCEQ will review and approve SWMPs.

Response 135:

TCEQ will perform an initial review on the information contained in the NOI form to determine receipt of all administrative information required on the NOI form. Following this administrative review, the application will be routed for technical review of the SWMP elements. TCEQ staff will review each MCM to determine compliance with the general permit. If TCEQ staff determines that all information is provided, then the application will be approved. If the SWMP lacks significant information in the SWMP, then TCEQ may deny authorization and require that the applicant submit additional information for review. Alternatively, TCEQ may determine that a specific element of an MCM must be revised, and TCEQ may approve the NOI with the added requirement to revise the SWMP. In response to the comment, the following language was added to the first paragraph of Part II.D.1. in order to clarify that TCEQ may approve the SWMP with changes: ". . . 3) approve the NOI and SWMP with revisions and/or provide a written description of the required revisions along with any compliance schedule(s), or 4) . . .."

Designated MS4s

Comment 136:

TCCOS and Mathews & Freeland comment that any designation of a small MS4 must provide the designee with the opportunity for a contested case hearing prior to designation. The permit assumes that the designation is final once a "written" notice is sent by TCEQ. TCCOS and Mathews & Freeland request modifying the language as follows: "Operators of MS4s described in Part II.A.2. must submit an NOI within 180 days of being notified in writing of a final decision of TCEQ regarding the need to obtain permit coverage."

Response 136:

A small MS4 operator who is designated by the executive director as requiring general permit coverage and wishes to contest that designation can file a motion to overturn and ask TCEQ's commissioners to set aside the executive director's designation. See 30 TAC §50.139.

Storm Water Management Program (SWMP)

Comment 137:

Group 1 comments that the schedule for implementation is an element of the SWMP that is fully described in Part III and requests deleting the following sentence in Part II.D.3.: "The SWMP must include a time line that demonstrates a schedule for implementation of the program throughout the permit term."

Response 137:

Part II of the permit describes the general permitting requirements, including a requirement to develop an SWMP according to the provisions of Part III. Part III of the permit is a detailed description of what must be contained in the SWMP and does not duplicate the requirements of Part II.D.3.

Comment 138:

Carter & Burgess asks whether the general permit regulates discharges to "surface waters in the State" or "Waters of the U.S." Carter & Burgess states that based on the definition of outfall, the permit appears to regulate discharges to "surface waters in the State," but that this section refers to "Waters of the U.S." and requests that TCEQ retain consistency throughout the permit. Lubbock comments that this permit is for discharges directly to "surface waters in the state," but that Part II.D.3. requires submitting an NOI and SWMP for discharges that will reach waters of the U.S.

Response 138:

The permit provides authorization for regulated discharges into surface water in the state. The permit requires the MS4 operator to develop an SWMP and other controls for discharges that reach waters of the United States. This requirement is consistent with the federal storm water regulations in 40 C.F.R. Part 122 and adopted by TCEQ in 30 TAC §281.25. Also, the definition for "outfall" was changed to reference "waters in the U.S.," because the SWMP must be implemented where discharges reach waters of the U.S., rather than water in the state.

Comment 139:

TxDOT requests revising the timeline to implement the SWMP from five years after the permit is issued to five years after the executive director has approved a small MS4's NOI. Otherwise, the MS4 operators will have to start implementing an SWMP before the NOI is approved and authorization is obtained.

Response 139:

Implementation of the SWMP is required when the NOI and SWMP are approved by TCEQ. TCEQ may require revisions to the SWMP, and will provide a compliance period, if necessary, to implement any changes. 40 C.F.R. §122.34(a), excluding the guidance portion of that rule, was adopted by reference at 30 TAC §281.25(b)(5) and specifies that a permitting authority may provide up to five years from the date the permit is issued to develop and implement an SWMP.

Comment 140:

Lloyd Gosselink requests adding the following language to the permit in order to provide a process for amending the SWMP and BMPs adopted by regulated MS4s. Lloyd Gosselink states that the permit does not appear to allow MS4 operators a procedure for making formal amendments to the SWMP and the following language is more consistent with existing Phase I MS4 individual permits:

"Necessary changes replacing less effective or infeasible best management practices specifically identified in the SWMP, or changes to any provision of the SWMP itself, may be requested at any time. Unless denied in writing by TCEQ, the change shall be considered approved and may be implemented by the permittee 60 days from submittal of the request."

Response 140:

The original draft permit did not require a review of the SWMP so it was appropriate to only require updates to the annual report. However, because the permit now includes a technical review of the NOI and SWMP, the requirements related to SWMP updates was revised for consistency with the Phase I MS4 storm water permits. This is especially important where revisions are substantive and were not considered by TCEQ in the original approval of the NOI and SWMP. In response to the comment, the last sentence in the first paragraph of Part II.D.3. was deleted and the following language was added after the first paragraph to describe the requirements to implement changes to the SWMP. This language is similar to the language used in individual Phase I MS4 permits:

Changes may be made to the SWMP during the permit term. Changes that are made to the SWMP before the NOI is approved by the TCEQ must be submitted in a letter providing supplemental information to the NOI. Changes to the SWMP that are made after TCEQ approval of the NOI and SWMP may be made following written approval of the changes from the TCEQ, except that written approval is not required for the following changes:

(a)Adding components, controls, or requirements to the SWMP; or replacing a BMP with an equivalent BMP, may be made by the permittee at any time upon submittal of a notice of change (NOC) form to the address specified on the form.

(b)Replacing a less effective or infeasible BMP specifically identified in the SWMP with an alternate BMP may be requested at any time. Changes must be submitted on an NOC form to the address specified on the form. Unless denied in writing by TCEQ, the change shall be considered approved and may be implemented by the permittee 60 days from submitting the request. Such requests must include the following:

(i) an explanation of why the BMP was eliminated;

(ii) an explanation of the effectiveness of the replacement BMP; and

(iii) an explanation of why the replacement BMP is expected to achieve the goals of the replaced BMP.

The fact sheet was also revised to include a discussion of changes to the SWMP (see Parts IV.C.2.(c)(2) and VIII.E. of the fact sheet). As indicated in the revised language, certain changes will still be allowed without notifying TCEQ, provided the changes are equal to or more stringent than the original SWMP. This will allow regulated MS4s the opportunity to implement the SWMP with as much flexibility as possible, while allowing TCEQ the opportunity to review significant changes.

Contents of the NOI

Comment 141:

TCUC and BCES ask why MS4 operators are required to provide the latitude and longitude of the approximate center of the MS4. Cleburne, Tarrant County, TAOC, Farmers Branch, Harris County, and NCTCOG comment that the requirement in item (1) to provide "the name, physical description, and latitude and longitude of the approximate center of the MS4" is impractical because "urban counties are not likely to have a contiguous boundary to define the urbanized area." Cleburne suggests that if latitude and longitude are required, then the use of the physical address of the SWMP is more readily available and consistent. If the latitude and longitude are necessary to attach Geographic Information System (GIS) information, NCTCOG, Farmers Branch, and Tarrant County suggest that the MS4 operator specify a generic location for data purposes. As an alternative, NCTCOG and Farmers Branch suggest TCEQ select a point from the urbanized area map. If no change to the permit is made regarding this point, NCTCOG and Farmers Branch request TCEQ issue a guidance document on how to make this determination. TCCOS, Mathews & Freeland, and Harris County request deleting this information because it is unnecessary.

Response 141:

Latitude and longitude are considered "core" information by TCEQ on permitted facilities and are captured in TCEQ's Central Registry Database. The NOI asks for the latitude and longitude of the approximate center of the storm sewer system, and not the center of the urbanized area or the center of the county. The latitude and longitude of the physical location of the SWMP is not an appropriate alternative as the SWMP may not be kept "on site" and could be located outside of the urbanized area. If the MS4 within the urbanized area is a long linear system, such as a roadside ditch along a publicly owned road within the urbanized area, the position approximately mid way along the length of the system is appropriate. If the MS4 is a more traditional system, such as the storm sewer system of a small town, the point in the approximate center of that system is appropriate.

Comment 142:

Tarrant County requests some clarification regarding Part II.D.4.(b)(1), related to Site Information. Tarrant County notes that some MS4s, such as counties, may not have a contiguous boundary; therefore, there is not a single center of the county. Tarrant County suggests that if TCEQ requires latitude and longitude, then allow the MS4 operator to specify a general location; alternatively, TCEQ could select a point off of the urbanized area map. NCTRSW also comments that the structure of county systems would make finding the geographic center difficult and asks TCEQ to provide clarification regarding this requirement.

Response 142:

The purpose of requesting the location of the approximate center of the MS4 is to provide information on entities that are permitted by the agency. TCEQ recognizes that regulated portions of urbanized areas are irregular and it is not easy to determine an exact center of the regulated area, particularly where regulated areas are not contiguous. After the permit is issued, TCEQ will make an NOI form available that includes instructions for determining the approximate center of the MS4. For a county or other entity where the regulated areas are not contiguous, it may be most accurate to choose the approximate center of the largest contiguous regulated area.

Comment 143:

Cleburne asks that if a municipal MS4 operator uses the corporate or extra territorial jurisdiction boundary would it require detailing on a map and updating through a notice of change (NOC) each time annexation occurs, or could they define it as the current corporate limit or extra territorial jurisdiction boundary.

Response 143:

The urbanized area that defines the minimum area within the MS4 that must be authorized will not change prior to the 2010 census. It is this area that must be described in the NOI, which may only be a portion of the MS4. However, the MS4 operator may decide to implement the SWMP and other pollution prevention controls throughout all of their MS4 even if portions are not within an urbanized area, but doing so would not trigger a need to submit an NOC, unless the MS4 operator also seeks to add authorization for municipal construction activities located outside of the regulated area.

Comment 144:

Universal City, HCEC, and TxDOT-Houston state that the requirement in Part II.D.4.(b)(1) to include a "physical description" of the MS4 in the NOI is unclear and exceeds the federal requirement for what is contained in the NOI. They request limiting NOI information to federal rules at 40 C.F.R. §122.33(b)(1) and §122.34(d). If TCEQ keeps the requirement, then the commenters request that TCEQ more precisely define what is required and limit the information to a brief statement describing the most common conveyance type, typical conveyance sizes, and approximate size of service area.

Response 144:

TCEQ requires information on either the physical address or physical description of all regulated entities. Because an MS4 is not adequately described by a single address, providing the physical description is necessary in order to obtain an adequate location of the MS4. The purpose of this description is to establish the location rather than to list physical characteristics. In response to comments, the term "physical description" was revised to "physical location description" in Part II.D.4.(b)(1).

Comment 145:

Sunland requests revising Part II.D.4.b.(4), related to the description of the area that is proposed for coverage under the optional seventh MCM, to add language similar to Part III.A.7.a.(ii). Currently, Part II.D.4.b.(4) requires that the NOI include "the boundary within which those activities will occur," and Sunland requests replacing the current language with the following: "a description of the area that this MCM will address and where the permittee's construction activities are covered (e.g. within the boundary of the urbanized area, the corporate boundary, a special district boundary, an extra territorial jurisdiction, or other similar jurisdictional boundary)." NCTRSW suggests using language similar to Part III.A.7.(a)(ii) to describe requirements for the geographic area where construction activities are conducted. NCTRSW suggests the change would avoid confusion with the requirement to include the specific construction site limits in the Storm Water Pollution Prevention Plan required in Part VI.J.1. of the permit.

Response 145:

This item refers to the general description of the location of this optional MCM, while the requirements in Part III.A.7.a.(ii) relate to more specific information that is included in the SWMP related to the MCM. Part VI.J.1. deals with the requirements for each particular site, so while location information will differ for each project, each project must be located within the general area described in the NOI and in the MCM. No changes were made to the permit language, but the NOI form will include instructions to help clarify the intent of this requirement to applicants once the permit is issued.

Comment 146:

Cleburne asks who is authorized to certify the SWMP and how is that authorization done. Cleburne also asks if the certification statement will be in the NOI or in the SWMP. Cleburne asks TCEQ to provide certification language if it is included in the SWMP.

Response 146:

The certification language will be included in the NOI. However, the NOI is not part of the permit and will not be finalized until after adoption of the permit, so the exact language is not available at this time. The certification must be signed in accordance with 30 TAC §305.44 (Part II.D.8 of the permit).

Comment 147:

Lloyd Gosselink comments that there is no need for the MS4 operator to identify a physical address for the location of the SWMP in the NOI and in the public participation requirements and requests removal of that requirement in Part II.D.4.(b)(6).

Response 147:

In response to the comments, the requirement in Part II.D.4.(b)(6), related to the NOI, was deleted because the SWMP is available to TCEQ and to interested persons as part of the permit application that is submitted. The applicant is required to include contact information for one person responsible for coordinating activities related to the SWMP and is also required to meet the public participation requirements in order to obtain authorization. TCEQ will have access to the original SWMP and all of the required annual reports that contain revisions to the SWMP, and the public can access these documents through the agency's Central Records office.

Comment 148:

Tarrant County, NCTRSW, Russell Moorman, Carter & Burgess, and TxDOT recommend revising the wording in Part II.D.4.(b)(7) related to the certification statement to clarify the required sequence of events related to certification of public participation requirements. The commenters note that the public participation requirements listed in Part II.D.12. of the permit are conducted following the required certification on the NOI. Tarrant County, Russell Moorman, and Carter & Burgess note that an MS4 operator cannot sign such a statement when some portion of the process occurs after the original certification is mailed to TCEQ. Sunland also comments that it is not feasible for the applicant to include with the NOI a certification that the applicant has met the public participation requirements, when Part III.D.12. of the permit states that the NOI must be submitted before the public participation requirements listed in Parts II.D.12.(b) through (j) are met. Carter & Burgess asks whether an NOC is required for every NOI once Part II.D.12. is completed.

Response 148:

In response to the comments, Part II.D.4.(b)(7) (now Part II.D.4.(b)(6)) was revised to include only information regarding the SWMP, and a new Part II.D.4.(b)(7) was added that states: *(7) a statement that the applicant will comply with the Public Participation requirements described in Part II.D.12.;. . ..*

Comment 149:

Carter & Burgess requests clarification in Part II.D.4.(b)(8) regarding how a classified segment can "indirectly receive" a discharge. Carter & Burgess states that an outfall "is either in a watershed or it isn't."

Response 149:

Part II.D.4.(b)(8) refers to discharges to unclassified waters that will eventually reach a classified water. The MS4 operator should trace the discharge route until reaching the first classified segment. As discussed in the newly added definition for "classified," this refers to specific waters that are listed in the Texas Surface Water Quality Standards, 30 TAC Chapter 307.

Comment 150:

TCCOS and Mathews & Freeland ask whether the reference in Part II.D.4.(b)(10) to the "latest CWA §303(d) list of impaired waters" includes those that were approved by EPA or whether it also refers to draft lists. Carter & Burgess comments that it is often a lengthy time period before EPA approves the CWA, §303(d) list, and asks whether it is wise to refer to the "latest" list in this permit. TCCOS and Mathews & Freeland comment that MS4 operators will have a problem determining the geographic reach of the segments listed. TCCOS and Mathews & Freeland recommend deleting this provision because it serves no useful purpose and because many of the small MS4s subject to this permit lack the resources to thoroughly understand the CWA, §303(d) list.

Response 150:

The applicable CWA, §303(d) list is the latest approved by EPA. Currently, EPA has approved the 2004 CWA, §303(d) list and it is the applicable list to TPDES permits. The list of impaired waters is available on the TCEQ Web site at: *http://www.tceq.state.tx.us/compliance/monitoring/water/quality/data/wqm/305_303.html#y2004.* The receiving water information will assist TCEQ in identifying those small MS4s that are affected by a TMDL or implementation plan.

Comment 151:

Universal City, HCEC, and TxDOT-Houston request deleting the requirement to list the impaired waters receiving discharges from the MS4 in Part II.D.4.(b)(10) because it exceeds the NOI requirements in the federal regulations.

Response 151:

TCEQ declines to make any changes to this requirement. Information regarding the receiving waters may be used by TCEQ to identify MS4s that are located in areas with water quality concerns or TMDLs that are in development.

Notice of Change (NOC)

Comment 152:

Carter & Burgess comments that an MS4 operator is required to submit an NOC if "any information" provided in the NOI changes, but that the original draft permit stated that an NOC was required if "any relevant information" provided in the NOI changes.

Response 152:

Information contained in the NOI is considered relevant to TCEQ's processing of applications under this general permit; therefore, TCEQ must receive written notification of any changes to information contained in the original NOI. Because TCEQ must conduct a review of the SWMP along with the NOI, any changes made to the SWMP before the NOI is approved are an addendum to the application. If changes are made to the SWMP after the NOI is approved, then notification must be made on an NOC form according to Part II.D.3. of the permit. Language was added to this section and to Part II.D.3. describing these requirements.

Change in Operational Control of an MS4

Comment 153:

DFW asks whether a notice of termination (NOT) and an NOI are required if the elected official or designated signatory on the NOI changes.

Response 153:

A change in the staffing for the position of authority that signed the NOI consistent with 30 TAC §305.44 for permit coverage would not require the MS4 operator to reapply for permit coverage.

Comment 154:

Travis County asks whether an NOT must be submitted every time a city annexes an area that includes part of a county's MS4, since the authority and responsibility for streets and drainage shift from the county to the city when annexation occurs.

Response 154:

An NOT is only required if an MS4 operator no longer is in operational control over any regulated or designated portion of the MS4. TCEQ recognizes that actual boundaries of MS4s change and that the SWMP will be updated to include new information. If significant areas changed such that information included on the NOI changes, then an NOC is required.

Signatory Requirement for NOI, NOT, and NOC Forms

Comment 155:

Tarrant County and NCTRSW suggest including the regulatory language from TCEQ rules at 30 TAC §305.44 in Part II.D.8., and note that it may simplify the preparation of these documents for MS4 operators not familiar with the specific legal language. The commenters add that including the language would stress the importance of complying with SWMP provisions. Euless suggests making these rules easily accessible on the internet.

Response 155:

TCEQ agrees that including information regarding the signatory rules for applications may be helpful to MS4 operators, and added information to the end of the first paragraph of Part VIII.B. of the fact sheet to include the specific Web address for finding the current rule language. Language was also added to the fact sheet to clarify that the NOI, NOT, and NOC forms must be signed according to this rule. The permit was not revised to include the specific language in §305.44 because, though unlikely, the rule is subject to change during the permit term.

Fees

Comment 156:

Houston, Missouri City, and HCFCD request removing the reference to 30 TAC Chapter 205 (relating to General Permits for Waste Discharges) because the general permit is not a general permit for waste discharges. Carter & Burgess comments that tying the annual water quality fee of $100 to an existing authority, Texas Water Code, §26.0291 and 30 TAC Chapter 205, or Texas Water Code, §26.0135(h) and 30 TAC §220.21, is an unnecessary connection to this permit with state law. Carter & Burgess suggests requiring a $100 submission fee with the annual report.

Response 156:

The authority to issue TPDES permits stems from the TWC. "Waste" is defined at TWC, §26.001(6) as "sewage, industrial waste, municipal waste, recreational waste, agricultural waste, or other waste as defined in this section." Storm water discharges are considered an "other waste" under the TWC and as regulated in the TPDES permit program. 30 TAC §205.6 specifically states that a person authorized by a general permit will pay an annual waste treatment inspection fee under Texas Water Code (TWC), §26.0291, consistent with §§305.501 - 305.507 of this title (relating to the Waste Treatment Inspection Fee Program) or as specified in the general permit. In this case, the permit includes a provision that charges persons authorized under the general permit the annual water quality fee. No changes were made to the permit based on the comments.

Permit Expiration

Comment 157:

Carroll & Blackman comments that the language in Item II.D.10.b. is confusing and recommends more specific language referring to each of the referenced permits.

Response 157:

TCEQ declines to revise the permit language, which indicates that existing dischargers regulated under the general permit could continue to operate under the terms and conditions of the general permit until a new permit is reissued, provided that TCEQ in a timely manner proposes to renew the general permit. Small MS4s which did not obtain coverage during the five-year permit term may not apply for coverage under an expired permit, and must either apply for an individual permit or wait until the general permit is reissued.

Public Participation

Comment 158:

Houston, Missouri City, and HCFCD comment that the public participation requirements in Parts II.D.12.(c) through (j), which were added to the permit appear more consistent with individual wastewater permits rather than general permit authorization. The commenters state that the additional requirements to publish notice, provide for public comments, and conducting public meetings, will significantly increase the permit application burden and cost for regulated MS4s. The commenters ask whether TCEQ would revise this section to meet the requirements of public notice by TCEQ publication of the applicants under the general permit in the *Texas Register*.

Response 158:

TCEQ determined that a public notice process with an opportunity for a public meeting is consistent with the 9th Circuit Court decision in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), which found that the public should have the opportunity to comment and request a public meeting on a general permit NOI submitted by a regulated small MS4.

Comment 159:

Mathews & Freeland comment that the notice, comment, and meeting requirement is inconsistent with TCEQ permit rules in 30 TAC Chapter 305, TCEQ's general permit rules in 30 TAC Chapter 205, and the terms of the MOA with EPA delegating the TPDES program to TCEQ. Mathews & Freeland comments that the Part II.D.12. are statements of general applicability that must be implemented as a rule, using statutorily imposed rulemaking procedures. Mathews & Freeland state that this provision is inconsistent with the 9th Circuits holding in *Environmental Defense Center v. EPA* because their reading of the case is that "the NOI and SWMP must be subject to the same opportunity for public notice and review as any other application for a NPDES permit." Mathews & Freeland state that TCEQ can use a general permit to establish permit terms, but not the processes to be used to obtain a permit and recommend that Part II.D.12. be deleted from the permit.

Response 159:

TCEQ disagrees that a general permit may not include public participation provisions. The general permit rule provisions in 30 TAC Chapter 205 allow flexibility in what requirements may be included for coverage under a general permit. 30 TAC §205.4(a) states that a "qualified discharger may obtain authorization to operate under a general permit by complying with the general permit's conditions for gaining cover-

age." These conditions are presumed to include public participation provisions at the discretion of TCEQ. For example, the concentrated animal feeding operation general permit, TXG920000, issued in July, 2004 contains similar public participation provisions for new and significantly expanding operations.

Additionally, TCEQ does not agree that the public participation requirements are in conflict with the holdings of the 9th Circuit in *Environmental Defense Center v. EPA*. On the issue of public participation the 9th Circuit stated that NOIs are subject to public availability and public hearings requirements. However, in the very next sentence of the opinion they specifically identify the applicable provisions in the CWA. The 9th Circuit stated: "The Clean Water Act requires that '[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public,' 33 USC, §1342(j), and that the public shall have an opportunity for a hearing before an [sic] permit application is approved, 33 USC, §1342(a)(1)" (see *Environmental Defense Center v. EPA*, 344 F.3d at 856). The provisions in Part II.D.12. are consistent with these specific CWA provisions because they require an applicant to publish notice that identifies the public location where copies of the NOI, SWMP, and TCEQ's general permit may be reviewed by the public, and if there is significant public interest, the requirement to hold a public meeting.

Comment 160:

Carter & Burgess asks how the executive director will determine that a public meeting is required before the end of the 30-day comment period, "at which point he knows if significant public interest exists?"

Response 160:

The provision to include public meeting information in Part II.D.12(c) only applies to those applications that generate significant public interest expressed after the NOI and SWMP are submitted, but before the executive director makes a preliminary determination on the NOI and SWMP. It allows a small MS4 to publish a combined notice for both the permit and public meeting and does away with the necessity of a second notice for the public meeting as described in Part II.D.12.(f). However, in most cases the executive director cannot determine if there is sufficient public interest in the NOI and SWMP until after the initial published notice of the executive director's preliminary decision. If the executive director determines that sufficient public interest exists, a second notice for the public meeting must be published and the executive director will direct the applicant to publish notice as described in Part II.D.12.(f).

Comment 161:

Grapevine expresses a general concern on how public participation requirements in Part II.D.12. will affect the established time line as it relates to authorization of discharges.

Response 161:

Authorization will begin after TCEQ issues written confirmation that the NOI and SWMP are approved. This authorization will occur following review of the NOI and SWMP, and completion of the public notice requirements. Obviously, if significant public interest exists, a delay of two or three months can be expected, depending on how quickly a public meeting can be scheduled and notice of the meeting published. As discussed in a previous response, no provisional authorizations are allowed under the permit.

Comment 162:

Lloyd Gosselink comments that there is no need for a permittee to identify a physical address where the SWMP may be viewed. Lloyd Gosselink states that the availability of the SWMP should be determined pursuant to the Texas Public Information Act and that the requirement to provide a physical address for the SWMP should be removed.

Response 162:

TCEQ disagrees with the request to remove the requirement to list in the public notice where the public will have an opportunity to view the NOI and SWMP during the public comment period in Part II.D.12.(c)(vi), because it is important that an interested person may easily find and review the application to facilitate meaningful public involvement.

Comment 163:

NCTRSW comments that the permit requirement in Part II.D.12.(d) should allow an MS4 to make publication in a newspaper with the greatest circulation within the actual MS4, and requests clarification of such. NCTRSW also requests that the permit clarify whether an MS4 that is located within two counties is required to publish in two newspapers. Cedar Hill requests the permit clarify whether publication is in a newspaper with the general circulation of the entire county or counties or whether it is sufficient if the publication is the "official" newspaper of the city. Cedar Hill notes that this may be an issue for a city that is located in two separate counties.

Carter & Burgess requests that the permit state that notice should be published in the official newspaper of the community (municipality or county), and also asks that this clarification be made to Part II.D.12.(b) of the permit.

Response 163:

In response to the comments, the first sentence of Part II.D.12(d) was changed and an additional sentence added to clarify where notice must be published: "This notice must be published at least once in the newspaper of largest circulation in the county where the small MS4 is located. If the small MS4 is located in multiple counties, the notice must be published at least once in the newspaper of largest circulation in the county containing the largest resident population."

Comment 164:

Carroll & Blackman asks TCEQ to clarify what period of time the public notice must run in a newspaper of local circulation.

Response 164:

Publication in a newspaper is required for one day, which will begin the 30-day public comment period. The instructions for public notice to each applicant will also include this information.

Comment 165:

Tarrant County and NCTRSW request addition of the italicized text in item Part II.D.12.(i): The executive director, after considering public comment, shall approve, *approve with conditions*, or deny the NOI based on whether the NOI and SWMP meet the requirements of this general permit.

Response 165:

In response to the comments, this revision was made. This change is also consistent with the revised permit language at Part II.D.1.

Comment 166:

Harris County, Houston, Missouri City, and HCFCD request that TCEQ clarify the authorization status for applicants during the period between submitting the NOI and/or SWMP and TCEQ's approval or denial. The commenters suggest that the permit include language stating that compliance with the SWMP during the review period meets permit requirements.

Response 166:

Authorization under this general permit, as well as the requirement to implement the SWMP, begins after TCEQ provides written approval of the NOI and SWMP to the MS4 operator. As noted in Response 125, the following sentence was added to the end of the first paragraph of Part II.D.3., to clarify that the SWMP must be implemented after the applicant receives approval of the SWMP: "Implementation of the SWMP is required immediately following receipt of written authorization from the TCEQ."

Comment 167:

Harris County, Houston, Missouri City, and HCFCD request revising Part II.D.12.(j) to include language stating that the executive director's decision will also be provided to the applicant and to all MS4s receiving the applicant's discharges.

Response 167:

Records of permit actions are available to the public and any interested parties. TCEQ will send written notification to the applicant regarding the executive director's decision, but at this time does not anticipate mailing separate notifications to other MS4s receiving the discharge.

Permitting Options

Comment 168:

TAOC, Missouri City, and Cleburne comment that Part II.E. provides narrower provisions for co-permitting than are allowed in the federal rules. They also comment that the provisions are not cost-effective and that they discourage cooperative arrangements that could provide cost savings and benefits. Cleburne comments that co-permitting with a single shared SWMP and coordinated measures would provide taxpayers with the most cost-effective way to achieve compliance, reduce the amount of paperwork for each MS4 operator, and decrease the number of SWMPs and annual reports TCEQ must review. Cleburne also comments that these permitting options do not allow for co-permitting even though co-permitting is referred to in Part V.B.2.(h) of the permit.

Response 168:

An MS4 operator that requests authorization under the permit must submit an NOI with an attached SWMP. However, MS4 operators may share the development and implementation of an SWMP. TCEQ agrees that this approach is cost-effective and provides other additional benefits. For example, MS4 operators that share a single SWMP may develop a more coordinated management program that is more watershed based, rather than limited to the considerations of a single storm sewer system or receiving water body. This approach may also avoid the development of individual and separate SWMPs that either duplicate or ignore the efforts of neighboring MS4 operators. However, TCEQ is not proposing that multiple MS4 operators submit a single NOI for coverage as co-applicants because aside from avoiding the application fee, there is no additional benefit to a co-application process.

Comment 169:

Cleburne believes that in areas where small MS4 jurisdictions overlap and are interconnected, items such as public education and participation are not readily distinguishable between MS4s. This could pose documentation problems in areas where MUDs, cities, counties, universities or colleges, TxDOT, and other transportation authorities are all serving the same population.

Response 169:

MS4 operators are encouraged to work together with programs that may affect the public within multiple jurisdictions. A public education program that crosses many lines of jurisdiction can work in favor of each MS4 operator within a single urbanized area. Each MS4 operator may get credit for a program provided that permission is granted from the entity that implemented the program. Such an agreement is required under 40 C.F.R. §122.35 and adopted by reference in 30 TAC §281.25(b)(6).

Comment 170:

TCCOS and Mathews & Freeland comment that the first sentence of this subpart states which MS4 operators are required to obtain an MS4 storm water permit. TCCOS and Mathews & Freeland believe that the requirements for coverage under the permit must be implemented as a rule, using statutorily imposed rulemaking procedures required by the Texas Government Code. TCCOS and Mathews & Freeland request deleting the first sentence of the paragraph from the permit.

Response 170:

Identifying small MS4s that require authorization under the Phase II storm water regulations was subject to TCEQ rulemaking when the federal rules were adopted by reference in 30 TAC §281.25. 40 C.F.R. §122.32(a)(1) states that a small MS4 is regulated if the small MS4 is "located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census." 40 C.F.R. §122.32(a)(2) further states that an MS4 is subject to the storm water program if it is designated by the NPDES permitting authority. The permit language follows the adopted rules, which states an MS4 operator must be authorized if it is "located in an urbanized area or if it is designated by TCEQ." Information regarding who must obtain authorization is provided in the permit to assist applicants.

Comment 171:

Harris County and Missouri City ask whether, in accordance with the language at 30 TAC §205.2(b), MS4 operators may be authorized within a discrete geographical area identified by an appropriate or combination of geographic or political boundaries (i.e., not limited to a single watershed).

Response 171:

30 TAC §205.2(b) gives the agency the flexibility to tailor general permit requirements for specific areas within the state. For purposes of this permit, TCEQ chose to use a statewide approach and included permit requirements protective of water quality in all areas of the state.

Comment 172:

TxDOT requests the permit include a provision allowing TCEQ to recognize that a contractually bound governmental entity is responsible for implementing an MCM when there is a documented cooperative agreement between government entities in their SWMP. TxDOT notes that in the EPA's response to comments, it says "if a DOT does not have the necessary legal authority to implement any part of this measure, EPA encourages them to coordinate with their surrounding MS4s and other state agencies . . .. Under today's rule, DOTs can use any of the options of §122.35 to share their storm water management responsibilities." Furthermore, TxDOT comments that EPA intended to allow the NPDES permitting authority to recognize when another governmental entity is responsible under an NPDES permit for implementing one or more of the MCMs, or alternatively, that the permitting authority itself is responsible. TxDOT states that, where the permitting authority is responsible, small MS4s are not required to include such MCM(s) in their SWMP.

Response 172:

TCEQ rules at 30 TAC §281.25 that adopt by reference 40 C.F.R. §122.35 allow the sharing or contractual sharing of responsibilities. Under §122.35(a), if an MS4 is relying on another governmental en-

tity to satisfy its permit obligations it must note that fact in its NOI and SWMP. However, §122.35(a) further states that the MS4 operator remains "responsible for compliance with your permit obligations if the other entity fails to implement the control measure (or component thereof)" and that it encourages legally binding agreements with other entities to minimize uncertainty about compliance with the permit.

In its response to comments on the Phase II rules, EPA stated that state DOTs can use the options provided under 40 C.F.R. §122.35. However, 40 C.F.R. §122.35(b) requires that the permitting authority recognize in either an individual or general permit that another government entity is responsible "under an NPDES permit for implementing one or more of the MCMs for your small MS4 or that the permitting authority itself is responsible." This provision is intended to allow small MS4s to exclude MCMs from the SWMP if the permit specifically recognizes that another government entity is responsible for implementing the MCM. TCEQ has not undertaken statewide implementation of any of the MCMs such that small MS4s can exclude them from their SWMP.

Comment 173:

Carter & Burgess comment that Part II.E.1.(a) of this subpart mentions an "acknowledgment"; however, Part II.D.12. of the revised permit states that an applicant will receive either an approval or denial.

Response 173:

In response to the comment, Part II.E.1.(a) was revised to reference the "notification of approval" rather than "acknowledgment." Additionally, a reference to submitting the SWMP was added after "NOI," to clarify that both are part of the application requirements.

Comment 174:

NCTCOG and Farmers Branch comment that Part II.E.1.(b), "Responsibilities," may be misleading and may discourage cooperative efforts by implying that failure of a cooperative partner would necessitate enforcement against an MS4 that expected to receive the benefit of a cooperative arrangement. NCTCOG and Farmers Branch suggest the following language: "Each permittee is entirely responsible for meeting SWMP requirements within the boundaries of their MS4, to include providing a schedule for alternative SWMP components if a cooperative partner fails to provide expected components."

Response 174:

It is the responsibility of each MS4 operator to meet the requirements of the permit. A shared SWMP is allowed to help reduce costs and to allow a more watershed-based approach to improving water quality. Although a cooperating MS4 operator may volunteer to satisfy a particular SWMP requirement for the other participating MS4 operators, it remains each MS4 operator's responsibility to ensure that the SWMP requirement is met. Participants in a shared SWMP may want to develop an element of the program that provides for a periodic evaluation of the program that is more frequent than the evaluation and annual report requirements established as a minimum in the permit.

Comment 175:

Grapevine requests that TCEQ consider and support any regionally directed initiatives (RDIs) created and introduced by the North Central Texas Council of Governments. Grapevine believes that RDIs will help regulated MS4s work together to manage storm water quality along jurisdictional boundaries. Grapevine notes both TCEQ and EPA have recognized the benefits of managing storm water quality from a regional perspective, and believes that TCEQ support of RDIs will more effectively protect human health, while also reducing bureaucracy.

Response 175:

TCEQ supports regional efforts to comply with water quality goals and recognizes that RDIs may provide an efficient mechanism for Phase II MS4s to comply with the permit. A regulated MS4 should include any regional efforts in the SWMP it proposes to utilize as well as information regarding the reasons how and why the initiative is appropriate for the discharger and meets the conditions of the permit.

Alternative Coverage Under an Individual TPDES Permit

Comment 176:

Carter & Burgess asks whether individual permit coverage is automatically required for an MS4 general permit holder once a TMDL is adopted for a "water of the U.S." within or downstream from the boundary of an MS4.

Response 176:

The development of a TMDL for an MS4 receiving stream does not automatically require the MS4 operator to apply for an individual permit. The purpose of a TMDL is to reduce the concentrations of the pollutants causing the impairment by limiting the amount being discharged to the water body. If it is determined that discharges from an MS4 are not a source of the impairment, or if the MS4 operator revises its SWMP for consistency with an approved TMDL and TMDL Implementation Plan, then an individual permit may not be warranted and authorization under the general permit may continue.

Comment 177:

Cleburne believes that the phrase "or other 30 TAC Chapter 205 considerations and requirements" in Part II.E.2. is too vague regarding how an MS4 operator may be required to obtain an individual permit. This language could be used to require an individual permit when there is no substantial information (such as water quality data showing impairment) that indicates the need for an individual permit. Cleburne recommends removing this phrase.

Response 177:

The provisions in 30 TAC §205.4 provide guidance on when the executive director may require an entity otherwise eligible for general permit coverage to instead apply for authorization under an individual permit. Applicants for authorization and MS4 operators with authorization under a TPDES permit are subject to this provision of the rules, regardless of whether or not the provision is referenced in the permit. Therefore, in order to provide this information to the regulated community, the reference is included in the permit.

Waivers

Comment 178:

Cleburne believes the second waiver option in Part II.F., cities, towns, counties, and areas with populations less than the EPA NPDES designated 10,000 population limit would have an extremely difficult time complying with TPDES MS4 permit requirements because they often do not have knowledgeable employees or a tax base large enough to support hiring employees.

Response 178:

This waiver option is identical to the waiver provisions in the final federal Phase II storm water regulations adopted by reference in 30 TAC §281.25. The requirements necessary to meet the conditions of this second waiver option are very difficult to meet and, as a result, it is unlikely that a small MS4 will qualify. However, because the federal regulations allow for the waiver, the provision was included in the permit.

Comment 179:

TCCOS and Mathews & Freeland comment that this section pertaining to waivers from permitting is a statement of general applicability that must be adopted as a rule rather than as part of a permit. TCCOS and Mathews & Freeland state that TCEQ cannot promulgate criteria for applicability determinations, including criteria for granting waivers, through the promulgation of a general permit. TCCOS and Mathews & Freeland object that there is insufficient time for any operator of a small MS4 to develop the information needed to qualify for a waiver prior to the application deadline. TCCOS and Mathews & Freeland request that the commission "commence a rule making proceeding to establish waiver provisions, and should exempt potentially eligible operators of small MS4s (those serving populations less than 10,000) from needing a storm water permit until 180 days after that rule making is completed."

Response 179:

The waiver provisions found in the permit were subject to TCEQ rulemaking when 40 C.F.R. §§122.30 to 122.37 were adopted by reference in 30 TAC §281.25. 40 C.F.R. §122.32(d) and (e) contain the waiver provisions that are included in the permit.

Comment 180:

DART asks how non-municipal entities that are in transportation corridors or airports will determine their population. NCTRSW requests the permit clarify how non-residential MS4 entities would evaluate the waiver options and notes that 40 C.F.R. §122.32(a) appears to include such entities in the federal definition although the waiver criteria are unclear.

Response 180:

The phrase "serves a population of less than" is defined by the average daily population of the system. In the case of a transportation corridor or airport, the average number of daily users and the employees of the system would constitute the number of people the MS4 serves.

Comment 181:

Dodson asks how the waiver process will be implemented when the burden of all the work is on TCEQ. If an MS4 believes it meets the criteria for the waiver under Part II, it must develop an SWMP, obtain coverage under the permit, and then wait for TCEQ to determine its eligibility for a waiver.

Response 181:

The waiver available in the permit for systems that serve a population less than 1,000 and whose system is not contributing substantially to the pollutant loadings of a physically interconnected regulated MS4 is obtained through a waiver certification form. This form will be available once the permit is issued and will allow entities to certify they meet all of the waiver criteria. Operators of MS4s serving a population less than 10,000 seeking to waive permitting requirements through the second waiver option must coordinate their efforts with TCEQ, who will determine if they meet the eligibility requirements for the waiver.

Comment 182:

Lubbock comments that the word "substantially," in Part II.F.1.(a),Waiver Option 1, is vague.

Response 182:

The language used in the permit was taken directly from the federal rule at 40 C.F.R. §122.32(d). TCEQ has not made any changes to the permit language regarding the term "substantially," but encourages any regulated MS4 operator interested in obtaining this permit option to contact TCEQ to determine whether the option is feasible. It was noted that the draft permit referenced the incorrect federal rule, so the citation was changed to 40 C.F.R. §122.32(d).

Comment 183:

Lubbock asks whether TCEQ has evaluated all state waters where Waiver Option 2 (Part II.F.2.a.) is attainable.

Response 183:

TCEQ has not evaluated all waters related to Waiver Option 2 and does not expect many regulated MS4s will be able to qualify for this option. Any MS4 operator interested in pursuing this option should contact TCEQ to discuss the possibility of it qualifying for this waiver.

Storm Water Management Program (SWMP)

Comment 184:

Universal City, HCEC, and TxDOT-Houston request changing the second sentence of the first paragraph of Part III. to the following, which the commenters believe would more closely reflect the federal regulatory language (40 C.F.R. §122.34(a)) related to the purpose of the SWMP:

"The SWMP must be developed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act."

Carroll & Blackman states that an MS4 operator cannot develop an SWMP that can prevent pollution to storm water, because of the great variety of sources affecting storm water; however, the practices described in the SWMP may affect change in the behavior of groups controlling potential pollutant sources. Carroll & Blackman suggests revising the sentence as follows:

"The SWMP must be developed to include practices to reduce pollution in storm water to the maximum extent practicable (MEP) and to effectively prohibit illicit discharges to the system."

Response 184:

TCEQ agrees that revising the language more accurately reflects the requirements in the federal rules and replaced the existing sentence with the following language:

"The SWMP must be developed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act and the Texas Water Code."

Comment 185:

Lloyd Gosselink expresses significant concern over the applicability of numeric effluent limitations to storm water discharges based on 30 TAC §319.28 that states "every waste discharge permit which does not currently specify effluent limitations for any of the hazardous metals covered by this subchapter is hereby amended to incorporate the terms of this subchapter." Lloyd Gosselink proposes adding the following language to the permit in order to clarify that the numeric, concentration-based effluent limitations of 30 TAC Chapter 319 do not apply to the discharges from regulated MS4s. Lloyd Gosselink notes that similar language is used in TCEQ Phase I MS4 permits, and believes that adding the following language will reflect that the BMPs established by the regulated MS4s are sufficient effluent limitations for the purposes of complying with this rule:

"The controls and Best Management Practices included in the Storm Water Management Program constitute effluent limitations for the purposes of compliance with the requirements of 30 TAC Chapter 319, Subchapter B, related to Hazardous Metals."

Lloyd Gosselink further requests that the commission clarify language in the fact sheet regarding the establishment of specific effluent limitations for discharges of the hazardous metals included in 30 TAC Chapter 319.

Response 185:

In response to the comments, a new paragraph was added to the end of the introductory section of Part III of the permit to include the requested language and the statement was also added to Part IX of the fact sheet. TCEQ agrees that these revisions help clarify that the permit is intended to require BMPs in lieu of numeric effluent limits.

Comment 186:

Grand Prairie requests reordering the six MCMs in the permit for consistency with the federal rules, where MCM Number 4 is Construction Site Storm Water Runoff Control, MCM 5 is Post Construction Storm Water Management in New Development, and MCM 6 is Pollution Prevention/Good Housekeeping for Municipal Operations. Grand Prairie states that many regulated MS4s have already initiated development of their SWMPs, and that the TPDES permit should reflect the federal language.

Response 186:

The permit was revised to reflect the order as stated in the federal rules. The fact sheet was not revised, as it already included the MCMs in the same order as listed in 40 C.F.R. §122.34.

Comment 187:

DAFB requests clarification on what the permit language "to the extent allowable under state and local law" means in the first sentence of Part III. DAFB is concerned that an MS4 operator may decide it does not have the authority to pass an appropriate ordinance to enforce its SWMP, when in fact, it has authority to do so. DAFB asks for identification of the applicable state laws and their limits so that MS4 operators know what laws apply.

Response 187:

The language "to the extent allowable under State and local law" was included in the permit to emphasize that MS4 operators are not required to regulate or enforce MCMs beyond their statutory and regulatory authority. The provisions of the permit must be implemented to the MEP but within the legal authority of the small MS4s. It is not possible to enumerate all state laws that might apply to all small MS4s. Different types of MS4s are subject to different state and local laws.

Comment 188:

TCUC, Harris County, Missouri City, TAOC, and BCES request revising the statement "to the extent allowable under state and local law . . ." at the beginning of each MCM section, since counties and some other regulated MS4s lack the statutory authority to carry out numerous provisions in the Phase II storm water program.

Response 188:

The phrase "to the extent allowable under state and local law" is stated in the preamble of Part III and applies to all elements of the SWMP, including each individual MCM.

Comment 189:

Group 1 comments that the last sentence in the preamble that states "existing programs or BMPs may be used to fulfill the requirements of this general permit" implies that only existing programs may be used, even though the SWMP is a combination of existing and new programs and request modifying the language to state: "A combination of existing and new programs (BMPs) . . .."

Response 189:

The language in the preamble does not limit the use of new programs to meet the requirements of the SWMP. It simply makes MS4 operators aware that programs developed for other reasons, prior to the MS4 regulations, may be included in the SWMP if they fulfill a permit requirement.

Comment 190:

Lloyd Gosselink and Carroll & Blackman comment that many of the provisions that address the requirements of the SWMP are very subjective and the permit does not contain guidance or even a template on implementing the minimum program components. Lloyd Gosselink and Carroll & Blackman state that TCEQ should provide such a template or guidance to clarify for MS4 operators what is needed to meet the subjective requirements of the permit.

Response 190:

TCEQ's Galveston Bay Estuary Program (GBEP) developed a model SWMP through an engineering agreement with Turner, Collie, and Braden, Inc. The resulting model SWMP contains an outline of Phase II regulatory requirements, an implementation plan to prepare for permitting, an SWMP shell that a regulated entity can complete to meet their individual needs, appendices with information and examples of BMPs for the six MCMs, and the draft SWMP that was completed for the City of Pearland. A copy of the model SWMP is available on the GBEP Web site *http://gbic.tamug.edu/locgov/swmp.html.* This SWMP model was developed before the draft TPDES permit was developed. This document may be used for guidance when developing an SWMP, although it also needs to include more recent TPDES permit changes. MS4 operators may develop a different format for the SWMP to best meet their needs, as long as the SWMP meets the requirements of the permit.

Comment 191:

TCCOS and Mathews & Freeland believe that TCEQ does not have the constitutional authority to compel local governments to regulate others. Thus, TCCOS and Mathews & Freeland state TCEQ "lacks the authority to impose many of the MCMs specified in this permit." TCCOS and Mathews & Freeland believe that TCEQ should ensure statewide application of the MCMs by implementing many of these measures at the state level.

Response 191:

TCEQ is the primary authority for regulating the discharge of waste into or adjacent to water in the state. Issuing this permit does not delegate that authority to the permitted MS4s. To comply with the conditions of the permit, MS4 operators must make certain that only eligible discharges are contributed to the MS4 and ultimately discharged from the permitted MS4. Therefore, MS4 operators must develop an illicit discharge detection and elimination MCM to identify and to remove illicit contributions to their systems. This control measure may include tracing dry weather flows to the source and determining if the wastewater contributors and storm water sources subject to TPDES permitting are properly authorized. Ordinances must be developed if it is within the ability of the operator that allow the operator to restrict illicit contributions to the MS4.

Comment 192:

TCCOS and Mathews & Freeland comment that the permit should state that compliance with the terms of an SWMP constitutes compliance with this part of the permit. TCCOS and Mathews & Freeland recommend that the permit contain express language addressing how TCEQ can request changes to an SWMP at any time during the permit term. For these reasons, TCCOS and Mathews & Freeland request revising

the permit to include the following language at the end of the introductory paragraph for Part III: "A discharger's compliance with its SWMP will be deemed compliance with Part III of this permit. If upon review, the Executive Director determines that a discharger's SWMP is deficient or inadequate, the Executive Director will provide notice of the deficiency or inadequacy, including an explanation of the basis for its determination and request that the discharger revise its SWMP. If the discharger fails to revise its SWMP in response to the Executive Director's request, the Executive Director may suspend authorization under this permit as stated in Part II.D. of this general permit."

Response 192:

In response to the comment, the end of the first paragraph of Part III. was revised to add the following sentence, which is similar to the requested first sentence except that the word "approved" was added before the term "SWMP." "A discharger's compliance with its approved SWMP will be deemed compliance with Part III of this permit." The second and third requested sentences were not added, since the TCEQ will review the SWMP for compliance with permit conditions before issuing authorization under the general permit.

Minimum Control Measures (MCM)

Comment 193:

Lloyd Gosselink requests that TCEQ develop a template or guidance that clarifies and addresses what is required, at a minimum, to meet the requirements of Part III of the permit because this section is very subjective. HCFCD comments that under 40 C.F.R. §123.35(g), TCEQ is obligated to issue a menu of BMPs to assist small MS4s and urges TCEQ to rapidly develop and issue this menu.

Response 193:

The permit outlines the minimum requirements required to meet each MCM. TCEQ recommends utilizing the menu of BMPs developed by EPA and adopted by TCEQ to help craft an SWMP. TCEQ expects that each municipality will have specific issues related to implementing their program and that each program will be different. The menu of BMPs may be accessed at: *http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm*. Additional MS4 resources from EPA are located at: *http://www.epa.gov/earth1r6/6wq/npdes/sw/MS4*. At this time, no additional guidance has been developed by TCEQ.

Comment 194:

DAFB requests a definition for the term "adverse impacts to water quality" or similar term that is used in Parts III.A.5(b)(2) and III.A.6 of the permit.

Response 194:

Adverse impacts to water quality are any actions that violate Texas Surface Water Quality Standards in 30 TAC Chapter 307.

Comment 195:

TCUC, BCES, and Harris County comment that throughout Part III.A. the permit uses the term "must" and "shall" that are more prescriptive than the EPA rule, which uses the terminology "may." The examples given by EPA were meant as guidance and TCEQ has turned them into mandates. TCEQ must allow each individual MS4 to develop its own public education and involvement program.

Response 195:

TPDES permits must be written such that the measures necessary to meet minimum compliance are clear and the provisions are enforceable. The requirements in Part III.A. of the permit are based on the final federal storm water Phase II requirements in 40 C.F.R. Chapter 122 and adopted by reference in 30 TAC §281.25. 40 C.F.R. §122.34 states "Your storm water management program must include the minimum control measures described in paragraph (b) of this section . . .," a reference to the six MCMs that are included in the permit. The federal regulations also offer guidance on what those MCMs may contain in order to comply with the federal regulations. Simply stating that each MCM be developed and implemented, without defining the minimum extent and level that satisfies the permit requirement, would not provide a clear set of permit requirements and would not create enforceable provisions. Therefore, TCEQ included many or most of the examples from the guidance as minimum permit requirements. However, these requirements form a broad-based outline of minimum requirements. Individual MS4 operators may develop their own public education program MCMs with a great amount of latitude and still meet the permit requirements.

Public Education and Outreach on Storm Water Impacts

Comment 196:

Universal City, HCEC, and TxDOT-Houston comment that the education requirements exceed federal requirements because the permit requires MS4 operators to explicitly consider population groups and to provide justification for not including certain population groups. The commenters believe that TCEQ should provide flexibility for operators to design appropriate programs without imposing additional documentation requirements.

Lloyd Gosselink comments that the EPA Phase II regulations encourage small MS4s to structure their public education programs to target specific audiences, but does not limit the potential categories of those audiences, nor require justification for excluding certain categories. Lloyd Gosselink believes that the requirement to provide justification why a particular group was not included is unnecessary and too restricting, and requests deletion of the last two sentences in Part III.A.1.(a) and replacing them with the following sentence: "The MS4 operator should consider, but is not limited to, the following groups in developing a public education program." Carroll & Blackman recommends revising the final sentence in Part III.A.1.(a) as follows, for consistency with the EPA's Model Permit language, and to take into account non-traditional MS4s, where the groups may not be applicable: "The MS4 operator may consider the following groups."

Response 196:

The federal rules related to this MCM do not specifically list all of the groups to consider, but the listed groups are important to consider as the MS4 operator develops its public education program. No changes were made to the permit language, because the listed groups are appropriate to consider in developing an education and outreach program. It is not overly burdensome for an MS4 operator to provide information about these groups. Many MS4 operators may not need to consider all of these groups, based either on the nature of the community served or the type of MS4. In these cases, the SWMP should justify why each group was excluded.

Comment 197:

Universal City, HCEC, and TxDOT-Houston request that the last sentence of III.A.1.(a) be revised to change "pollution" to "pollutants," and comment that the term "pollution" does not adequately follow statutory and regulatory terminology and could lead to legal uncertainties.

Response 197:

In response to the comments, the final paragraph of Part III.A.1.(a) was revised for consistency with the language used in the federal rules at 40 C.F.R. §122.34(b)(1), related to public education and outreach. The section was changed to: "The outreach must inform the public about the impacts that storm water run-off can have on water quality, haz-

ards associated with illegal discharges and improper disposal of waste, and steps that they can take to reduce pollutants in storm water runoff." Additionally, the term "implemented" was added to the first sentence of the first paragraph of this item for consistency with the federal language.

Comment 198:

Cleburne believes that the State of Texas already has an extensive public education arm that receives federal as well as state funding and, since this infrastructure is already in place working through cooperative programs (Keep Texas Beautiful, Don't Mess With Texas, Texas Watch, River and Lake Clean Up, etc.), it seems that TCEQ and the state are very capable of providing the public education and outreach component of the MCMs. Cleburne comments that this would provide a more cost-effective, uniform, and complete education for the citizens of Texas. Therefore, Cleburne suggests that TCEQ commit to providing the public education component statewide and enroll voluntary assistance of MS4 operators to pass along information to their constituents that is provided by TCEQ.

Response 198:

The final federal Phase II storm water regulations at 40 C.F.R. §122.34 require that the operators of small MS4s subject to the permit requirements develop and implement a public outreach and education MCM. The permit allows small MS4s to use existing programs to fulfill SWMP permit requirements. Where programs are developed and implemented by a separate entity, the MS4 operator must describe how those programs meet each of the permit requirements and achieve the SWMP goals specific to its MS4.

For TCEQ to assume the public education component on a statewide basis, 40 C.F.R. §122.35(b) requires that the permitting authority recognize in either an individual or general permit that another government entity is responsible "under an NPDES permit for implementing one or more of the MCMs for your small MS4 or that the permitting authority itself is responsible." This provision is intended to allow small MS4s to exclude MCMs from the SWMP if the permit specifically recognizes that another government entity is responsible for implementing the MCM. At this time, TCEQ has not undertaken statewide implementation of any of the MCMs such that small MS4s can exclude them from their SWMP.

Comment 199:

V&E asks for clarification on who constitutes "public service employees." V&E requests revision of the list in this part to include reference to residents and governmental and commercial and industrial employees who are routinely situated in the MS4 service area.

Response 199:

The current list includes businesses, commercial, and industrial facilities, which means that the program should include the employees that work in these facilities. Similarly, public service employees are those employees that work for governmental agencies with facilities located within an MS4.

Comment 200:

Tarrant County, Freese & Nichols, Group 1, NCTRSW, Harris County, Grapevine, Lloyd Gosselink, NCTGOG, Grand Prairie, Cleburne, Carter & Burgess, Farmers Branch, and Carroll & Blackman recommend removing from Part III.A.1.(a), item (2), "visitors" from the public education MCM. Tarrant County and Grapevine state that this group was not included in EPA's draft Phase II permit. Tarrant County comments that visitors are not likely to produce pollutant discharges to the local MS4 except during special events such as fairs, when staff of the regulated MS4 would handle illicit discharges. Lubbock suggests that public education and outreach is more productive if operators could target educational institutions more than visitors. Harris County believes that the requirement for providing public education and outreach for visitors is unreasonable because visitors are generally short-term occupants who may be in town for a single event and it is not appropriate to expect concern or responsibility on the part of the visitor for the environmental, social, economic health and viability of the visited region. Harris County also states that small MS4s may have limited budgets and that it is unreasonable to expect them to spend resources on educating visitors, in part because any water quality benefits are insignificant. Harris County recognizes that visitors can and do impact water quality, but suggests addressing these impacts through other efforts, such as street sweeping during major events. Carter & Burgess states that the inclusion of "visitors" contradicts the exclusion of "transient (nonresidential) populations" in the definition of an MS4. Carter & Burgess states that it does not make sense to argue that some facilities do not meet the definition of MS4 because they serve only a transient (nonresidential) population, and then require an MS4 operator to consider a transient (nonresidential) population in their outreach. Lloyd Gosselink, NCTGOG, Farmers Branch, and Carroll & Blackman state that it removes the flexibility that the federal rules provide for Phase II MS4s to tailor public education programs to the local audience. Group 1 comments that "visitors" will be impossible to define and target and that it is likely that visitors from outside of the community will be exposed to this program in their home communities. Freese & Nichols comments that the term "visitors" is ambiguous. Lloyd Gosselink, NCTGOG, Farmers Branch, and Carroll & Blackman state that requiring public education for visitors may result in an impractical and inefficient use of resources as well as resulting in duplication of effort for small MS4 operators. Removing the term from the permit would allow MS4s to focus their education programs on the constituents that can be most affected by the educational program. Grand Prairie states that visitors to the city are informed of storm water impacts through the municipality where they reside and the permit already requires the MS4 operator in Section III.A.1.(b) to ensure that all reasonable attempts are made to reach all constituents within the MS4. Cleburne comments that visitors are a difficult group to reach and, although some educational outreach may reach visitors, documenting this is difficult and that visitors should only have a limited impact on water quality discharges from an MS4. V&E requests clarification regarding how an MS4 operator is to accurately track and target all visitors that enter into the MS4 area of service.

Response 200:

Visitors may not always be a group that every small MS4 operator must target for public education and outreach, but TCEQ supports the existing requirement that each small MS4 operator consider each of the listed groups in Part III.A.1.(a) and provide written justification for any of the listed items they decide not to include. However, the MS4 operator may determine that they do not need to target visitors for public education and outreach, based in some cases, on the reasons discussed by several of the commenters. Some MS4s, for example, toll authorities and TxDOT, do not serve a resident population and therefore must develop programs that interact with "visitors" who use their systems. These systems can count the number of visitors as the number of users of those transportation systems. In this context, examples of "visitors" to a toll authority or TxDOT are drivers on the roadway within the MS4 or employees of those systems who work within their boundaries. In response to an earlier comment, TCEQ described changes to the definition of "small MS4" that removed the term "transient" and included further clarifications to the definition to meet the intent of recognizing that certain school buildings and office complexes may not meet the definition of "system."

Comment 201:

Group 1 comments that industrial monitoring and inspection programs are specifically not mandated for Phase II MS4s by the federal rules in order to ease the financial burden of the illicit discharge and elimination program. Since the municipality has no permit requirement to legally prohibit industrial discharges or perform industrial inspections, small municipalities should not be required to specifically target industrial facilities for public education and outreach. Group 1 requests deleting item (5) from Part III.A.1.(a), the public education and outreach MCM.

Response 201:

The public education and outreach MCM is not a program to monitor and inspect industrial facilities. 40 C.F.R. §122.34(b)(3) states that the MS4 operator must "inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste." This requirement is tied to the illicit discharge detection and elimination program in the rules and was moved to the public education and outreach MCM in order to group all educational requirements under one MCM. The term "businesses" includes "commercial and industrial facilities." This group was listed in the permit to clarify the intent of the rule. In addition, the education of commercial and industrial facilities can be considered the first step in implementing the illicit discharge detection and elimination MCM as such facilities may be discharging unauthorized waste streams.

Comment 202:

Cleburne comments that it is difficult to reach and document public information outreach to individuals working on construction sites that are inherently hazardous locations. However, providing information to the operators of construction sites for their employees is more attainable and practicable.

Response 202:

The permit does not require the education of construction site personnel to occur on the construction site. This education may be conducted through educational seminars, meetings, mailouts, or through some other mechanism that the MS4 operator determines appropriate.

Comment 203:

Universal City, HCEC, and TxDOT-Houston comment that Part III.A.1.(b) should not require documentation of public education activities, such as brochures and website content, in the annual report, but rather summarize the public education activities and achievement of associated measurable goals and deadlines in a tabular format. The commenters believe that the MS4 operator should maintain the supporting documentation, which will result in streamlined reporting, facilitation of TCEQ review, and avoidance of excessive materials sent to TCEQ. The commenters also note that the current requirement to provide this supporting documentation exceeds federal requirements in 40 C.F.R. §122.34(g)(3). Lubbock requests that TCEQ expand on the phrase "documentation shall be detailed enough . . .."

Response 203:

The permit language does not require an MS4 operator to include actual brochures and similar information in the annual report. The MS4 operator must provide enough information in the annual report to describe in detail the actions taken throughout the year to comply with the permit conditions. Some MS4 operators may elect to provide a short description of the type of paperwork that was provided to the public, along with a table showing how many and how often the documents were distributed. Other MS4 operators may elect to include actual examples of information provided to the public. The information included must be detailed enough to demonstrate compliance with the public education and outreach MCM, while taking into consideration the need for the annual report to remain concise. The particular information included in the annual report is described at Part IV.B.2. of the permit.

Public Involvement/Participation

Comment 204:

TxDOT believes that this MCM is more applicable to entities that have a significant involvement with and multifaceted responsibilities to the local residents of the urbanized area where they operate than to a state agency that may control only a very small portion of a larger MS4. TxDOT requests that either the permit include only the public involvement requirements as described by the EPA in 40 C.F.R. §122.34(b)(2)(i) or less specific TPDES requirements.

Response 204:

The permit requires the development of a public education and outreach MCM because it is specifically required in the federal regulations at 40 C.F.R. §122.34(b)(2)(i) and as adopted by reference in 30 TAC §281.25. 40 C.F.R. §122.34(b)(2)(i) simply states that the MS4 operator must "at minimum, comply with State, Tribal, and local public notice requirements when implementing a public involvement/participation program." However, the extent of this program may vary greatly depending on the nature of the small MS4 and the interaction, or lack thereof, between the small MS4 operator and the public.

Comment 205:

DAFB notes that Part II.A.2.(b) requires MS4 operators to comply with state and local public notice requirements when implementing a public involvement/participation program and requests guidance regarding where one can find the State of Texas public notice requirements. Fort Hood asks for information regarding what state and local public notice requirements apply when implementing a public involvement/participation program.

Response 205:

State of Texas public notice requirements for government entities can be found in the Texas Government Code, Chapter 551 - Open Meetings.

Comment 206:

Grapevine notes that it supports the changes that were made to this section following the original draft permit and that the additional clarification will allow for more effective application of the regulations.

Response 206:

The revisions to this section were made as a response to several comments that were received following the 2002 publication of the draft permit.

Illicit Discharge Detection and Elimination

Comment 207:

TCCOS and Mathews & Freeland comment that TCEQ lacks the constitutional authority to require municipalities to regulate others through the illicit discharge detection and elimination MCM. TCCOS and Mathews & Freeland comment that the regulatory controls envisioned by this MCM are fully within TCEQ's regulatory jurisdiction. TCCOS and Mathews & Freeland contend that TCEQ should not pass these statutory obligations down to other governmental entities without providing funding for the implementation of these obligations.

Response 207:

The requirement to develop an illicit discharge detection and elimination MCM is found in 40 C.F.R. §122.34 and adopted by TCEQ by reference in 30 TAC §281.25. The rule requires that a small MS4 "develop, implement, and enforce a program to detect and eliminate illicit

discharges." However, TCEQ does not require that municipalities regulate third parties beyond their authority. If a municipality lacks the authority to enforce a prohibition against illicit discharges when it identifies such discharges, it can request the entity causing the discharge to stop the discharge. If they will not voluntarily comply, the municipality may report suspected violations to TCEQ by calling the Environmental Violations Hotline at 1-888-777-3186 or their local regional office.

Comment 208:

Bunker Hill requests addressing the prohibition of non-storm water discharges in TWC Chapter 7 so that MS4 operators could incorporate them by reference.

Response 208:

TCEQ may not make changes to the TWC. Changes to the TWC must be made by the Texas Legislature.

Comment 209:

Travis County asks whether Part III.A.3.(a) is an adequate regulatory mechanism for a county to take enforcement action against illicit dischargers under TWC, §7.351, based on various statutes and TCEQ rules prohibiting pollution of water in the state.

Response 209:

TWC, §7.351 may not be an adequate regulatory mechanism in all cases, but the statute does give local governments the authority to bring a lawsuit in district court for violations under TWC, Chapters 16, 26, or 28 and Texas Health and Safety Code, Chapters 361, 371, 372, and 382. If a violation is occurring in the jurisdiction of a local government, the statute allows them to institute a civil suit in the same manner as TCEQ for injunctive relief and/or civil penalty against the person who committed, is committing, or is threatening to commit a violation.

Comment 210:

Lubbock questioned whether elimination of illicit discharges is an attainable goal and requests addressing this terminology.

Response 210:

The general permit requires implementing this MCM to the MEP. It may not be feasible to control every illicit discharge, but the MS4 operator is responsible for developing a program that most efficiently addresses the goal of eliminating illicit discharges to the MEP. The Center for Watershed Protection (CWP) has developed a guidance document that may be helpful in developing an Illicit Discharge Detection and Elimination Program, which can be found at: *http://www.cwp.org/IDDE/IDDE.htm*.

Comment 211:

Harris County notes that it supports the wording in this minimum measure requirement.

Response 211:

Several revisions were made to this section in response to comments received in 2002 following public notice of the original draft permit.

Comment 212:

Universal City, HCEC, and TxDOT-Houston state that the requirements in Part III.A.3.(1) and (2) to list techniques used for detecting illicit discharges in the SWMP, and to include appropriate actions to remove the source of illicit discharges, exceeds federal requirements, which call for MS4 operators to "develop, implement, and enforce a program to detect and eliminate illicit discharges" during SWMP implementation. They state that it is inappropriate to list techniques and document actions prior to submitting an NOI when federal requirements and the permit allow a five-year implementation schedule, and when the process is very involved. The commenters request allowing MS4 operators to outline the overall approach to implementing all of the provisions of this MCM, but address the actual detection techniques in the MS4's accompanying illicit discharge detection plan.

Response 212:

The SWMP that is submitted with the NOI for permit coverage must include a description of all six MCMs (and potentially the optional seventh MCM). Where elements of an MCM are not yet developed, the SWMP must include a schedule for developing them such that full implementation of the SWMP is accomplished within five years from the date the permit is issued. Therefore, the SWMP submitted with the NOI for authorization may address, for example, the lack of a list of techniques used to detect illicit discharges, or a lack of documentation of actions to remove illicit discharges, by providing a description of the types of information that will be considered, as well as a schedule for developing the required information.

Comment 213:

Carroll & Blackman requests revising the first sentence of Part III.A.3.(a)(2) for consistency with EPA's Model Permit, and notes that the change will also help to address non-traditional MS4s such as counties, certain districts, and transportation agencies which cannot develop or enforce a regulatory mechanism. Carroll & Blackman states that these MS4s would not be able to remove the source of the discharge, but will instead rely on another entity to do so. Carroll & Blackman requests revising the first sentence to replace the term "remove" with "effectively prohibit": "The SWMP must include appropriate actions and, to the extent allowable under State and local law, establish enforcement procedures for effectively prohibiting the source of an illicit discharge."

Response 213:

As explained in an earlier response, TCEQ does not require small MS4s to regulate third parties beyond their authority. If an MS4 operator lacks the authority to enforce a prohibition against illicit discharges when it identifies such discharges, it can request the entity causing the discharge to stop the discharge. If they will not voluntarily comply, the MS4 operator may report suspected violations to TCEQ by calling the Environmental Violations Hotline at 1-888-777-3186 or their local regional office.

Comment 214:

Grapevine requests additional clarification regarding the following sentence found in Part III.A.3.(a)(2): "Where the permittee lacks the authority to develop ordinances or to implement enforcement actions, the information regarding the illicit discharge may be referred to TCEQ's regional field office." Grapevine asks that TCEQ provide specific direction about what is expected for local control and when issues can be referred to TCEQ. Grapevine asks for guidance regarding how much enforcement is considered enough for local authorities to implement. Finally, Grapevine states that without further clarification, TCEQ would likely receive a very large number of referrals of storm water enforcement concerns. TxDOT comments that it supports the inclusion of the final sentence of this section, and notes that TxDOT lacks authority to develop ordinances and implement enforcement actions; therefore, TxDOT relies on other entities to do so.

Response 214:

TCEQ deleted the noted sentence in Part III.A.3.(a)(2) and replaced it with language in the introductory section of Part III that it is using in the medium and large Phase I MS4 individual permits in order to address certain entities that do not have enforcement authority, such as TxDOT.

The new language intends to ensure that the MS4 operator attempts to meet the SWMP MCMs to the extent that it has authority and the available resources, prior to notifying TCEQ. The new language states:

"Where the permittee lacks the authority to develop ordinances or to implement enforcement actions, the permittee shall exert enforcement authority as required by this permit for its facilities, employees, and contractors. For discharges from third party actions, the permittee shall perform inspections and exert enforcement authority to the MEP. If the permittee does not have enforcement authority and is unable to meet the goals of this general permit through its own powers, then, unless otherwise stated in this general permit, the permittee shall perform the following actions in order to meet the goals of the general permit: Enter into interlocal agreements with municipalities where the MS4 is located. These interlocal agreements must state the extent to which the municipality will be responsible for inspections and enforcement authority in order to meet the conditions of this permit; or, if the permittee is unable to enter into inter-local agreements, it may notify TCEQ's Field Operations Division as needed to report discharges or incidents when it does not have enforcement authority."

In addition, language was added to the end of the second paragraph of Part IV.C.1. of the fact sheet to reflect the change.

Comment 215:

Carter & Burgess comments that it will be difficult for an SWMP to establish enforcement procedures with the 180-day time frame required in the permit, but that it would likely be feasible to include a "plan to establish enforcement procedures."

Response 215:

The requirements of the SWMP were not revised, but TCEQ notes that the MS4 operators will have five years from the date the permit is issued to fully implement each MCM. To the extent that enforcement procedures are known, the MS4 operator should include that information in its SWMP. Over the permit term, TCEQ expects that MS4 operators will enhance their SWMPs so that more specific information is included as knowledge is gained from the implementation process.

Comment 216:

Group 1 comments that industrial monitoring and inspection programs are not mandated by Phase II rules as part of the illicit discharge and detection MCM. Since municipalities have no permit requirements to legally prohibit industrial discharges or to perform industrial inspections, small MS4 operators should not be required to specifically include any industrial outfalls in the dry weather screening program.

Response 216:

Although many MS4 operators may elect to include inspections of major industrial contributors to their systems as a component of the illicit discharge detection and elimination MCM, they are not required to do so. If the MS4 develops a dry weather screening tool as a part of the illicit discharge and detection MCM, then the MS4 would necessarily have to trace all dry weather discharges to the source, industrial or otherwise, to establish if it is an illicit discharge or a non-storm water discharge with the proper authorization for discharge.

Comment 217:

DAFB requests clarification in Part III.A.3.(b) regarding what is an acceptable mechanism to show that the MS4 operator considered non-storm water flows. Also DAFB requests a definition for the term "significantly contribute."

Response 217:

One option the MS4 operator has is to incorporate the consideration of non-storm water discharges as a part of a dry weather screening program, which complies with the permit requirement for the illicit discharge detection and elimination MCM. To implement this option the MS4 operator would screen the entire system within the five-year term of the permit for dry weather flows. When a flow is detected, it is traced to the source. If it is determined that the flow is a non-storm water source listed in Part II.B or Part VI.B, it is an allowable non-storm water discharge, unless the MS4 operator determines it is a significant source of pollutants. In making this determination, the MS4 operator may consider the conditions of the receiving water, noting any change that can be attributed to the dry weather flow, such as color, foam, changes in the aesthetic qualities, or obvious toxic effects to aquatic organisms and algal communities. The MS4 operator may also consider the physical character of the discharge itself. Finding the source as a potentially allowable non-storm water discharge and lacking indication of the presence of significant pollutants, the MS4 operator could conclude that the source is not a significant source of pollutants. Alternatively, if the discharge remains suspect, the MS4 operator can sample and conduct laboratory analyses for a range of suspected pollutants.

Comment 218:

EIS comments that if fire fighting activities may be excluded from consideration as an illicit discharge, unless they are a significant contributor of pollutants, why not require fire departments to use environmentally friendly soaps when washing their trucks. EIS states that it should be standard practice to use less damaging detergents.

Response 218:

This comment was received during the original comment period on the draft permit in 2002. The revised permit added language to state that fire fighting activities were those that resulted from the emergency response to a fire and the activities required to extinguish the fire and specifically states they do not include washing of trucks. However, the permit is sufficiently flexible to allow the introduction of a number of non-storm water discharges to the permitted storm sewer system where the MS4 operator determines that those discharges do not constitute a significant source of pollutants. The MS4 operator may decide to develop and enforce local ordinances to control contributions to the permitted systems based on the types of non-storm water contributions and based on local conditions and water quality concerns. These ordinances can include conditional controls, such as the use of "environmentally friendly" soaps, which satisfy the MS4 operator that the discharge is not a significant source of pollutants.

Comment 219:

Cleburne believes that under the definition of illicit discharge, non-storm water discharges would fall under Part III.A.3.(a), relating to illicit discharges and would require elimination from the MS4. Cleburne states that many of the flows listed in Part II.B. are beyond the control of the MS4 operator and that under most instances these flows do not contribute pollutants. Cleburne comments the remainder of the allowable non-storm water discharges have little potential to adversely affect water quality and that it is more cost-effective for the operators to identify the contributing pollutant sources and eliminate them. Cleburne recommends deleting this language from Part III.A.3.(a). TCCOS, Mathews & Freeland, Tarrant, and NCTCOG ask whether the determination on the significance of the discharge is made by the MS4 operator or by TCEQ. Freese & Nichols comments that the permit should clearly state who makes the determination of what constitutes significant contributors of pollution to the MS4.

Response 219:

The introductory paragraph in Part II.B. states that non-storm water discharges listed in that part are not considered illicit discharges, unless the MS4 operator determines that they are substantial sources of pollutants to the MS4. Therefore, they must be eliminated as an illicit discharge only when it is determined by the MS4 operator that they are a significant source of pollutants (40 C.F.R. §122.34(b)(3)(iii)).

Comment 220:

TCCOS and Mathews & Freeland comment that the permit does not adequately explain what types of incidental non-storm water discharges are allowed by this provision. The EPA model general permit gives examples of allowable discharges, which include non-commercial or charity car washes. TCCOS and Mathews & Freeland request revising the first two sentences in Part III.A.3.(b) as follows, to include the italicized additional language: "A list of occasional incidental non-storm water discharges (*e.g., non-commercial or charity car washes, etc.*) that will not be addressed as illicit discharges may also be developed. If developed, the listed discharges must not be reasonably expected to be significant source of pollutants, based on information available to the MS4 operator, because of either the nature of the discharge or the conditions that were established for allowing these discharges to the MS4 (*e.g., a charity car wash with appropriate controls on frequency, proximity to sensitive waterbodies, BMPs on the wash water, etc.*)."

Response 220:

The language of the permit is adequately flexible to enable the MS4 operator to identify and allow a number of incidental non-storm water contributions to the permitted system. It is not feasible to provide a comprehensive list of non-storm water discharges that are considered incidental and not a significant source of pollutants by the MS4 operator. The example of charity car wash activities might be included in this category where the MS4 operator is able to identify and require controls that are protective of receiving water quality. However, based on local water quality concerns, this also might be an activity that the MS4 operator would either encourage or require to occur with the cooperative assistance of local commercial car wash enterprises where the wastes are routed to a treatment works.

Comment 221:

TxDOT agrees that it is not necessary to address some incidental non-storm water discharges as illicit discharges. However, TxDOT believes that it is not possible to know, before an SWMP is implemented, which discharges will not be significant contributors of pollutants. Cleburne comments that a definition of incidental non-storm water discharges was not included in the permit and that most MS4 operators will not be able to develop a list of incidental non-storm water discharges prior to initial permitting.

Response 221:

It is likely that the universe of non-storm water contributions to the permitted system will not be apparent before the SWMP is developed and implemented. However, the SWMP can contain a list of the most common discharges that are apparent to the MS4 operator. As additional discharges to the system are identified during implementation of the illicit discharge detection and elimination MCM, those discharges may be added to the list. During the term of the permit the MS4 operator may identify a number of non-storm water discharges to eliminate or control because it is determined they are significant sources of pollutants.

Comment 222:

Universal City, HCEC, and TxDOT-Houston request that TCEQ modify the last sentence of Part III.A.3.(b) to clarify that the description of local controls to address non-storm water discharges in the SWMP is only required if the MS4 operator elects to develop a list of incidental non-storm water discharges.

Response 222:

In response to this comment, the last sentence of Part III.A.3.(b) was revised as follows:

"If this list is developed, then all local controls and conditions established for these listed discharges must be described in the SWMP and any changes to the SWMP must be included in the annual report described in Part IV.B.2. of this general permit, and must meet the requirements of Part II.D.3. of the general permit."

Comment 223:

Cleburne comments that there is no reason to develop a list of incidental non-storm water discharges because if they are potential significant sources of pollutants then they are illicit discharges and handled as such. Cleburne comments that it appears that TCEQ is conveying permitting authority to the MS4 operator if special provisions for discharge must be established allowing certain incidental non-storm water discharges to the MS4. Cleburne states that, if that is not the intent, then TCEQ should delete the section relating to incidental non-storm water discharges from the permit. Cleburne states that, if it is the intent to convey permitting authority, then Cleburne is opposed to having this responsibility delegated to the MS4 operators. TxDOT comments that the intent of the illicit discharge MCM is to detect discharges that contribute significant pollutants, not to specifically rule out incidental non-storm water discharges that do not.

Response 223:

As the MS4 operator implements the illicit discharge detection and elimination MCM, a number of incidental and occasional non-storm water contributions to the system may be identified. If the MS4 operator determines these non-storm water discharges are not a significant source of pollutants, the MS4 operator may allow these discharges to their MS4. Developing and maintaining this list of allowable non-storm water discharges provides the MS4 operator a reference of their prior findings and a record that supports compliance with the permit requirements for this MCM. However, the permit does not require an MS4 operator to develop such a list.

In addition, TCEQ is not delegating permitting authority to MS4 operators. The illicit discharge MCM places on the MS4 operator the responsibility of determining whether non-storm water discharges are a significant source of pollutants and requires they prohibit this contribution to their storm sewer system only if it is significant. Maintaining a list of occasional incidental non-storm water discharges provides assistance to the MS4 to comply with the provisions of their storm water permit and is not a requirement to separately enforce the TWC or CWA.

Comment 224:

Tarrant County comments that identifying "waters of the U.S." receiving discharges is difficult for purposes of the map required by Part III.A.3.(c) and requests some standardized means of identifying "waters of the U.S.," such as United States Geological Survey (USGS) quad maps or FEMA maps. Tarrant County asks for a reference source where some form of these maps or their equivalent can be accessed to identify "waters of the U.S."

Response 224:

MS4 operators may utilize maps such as a USGS quadrangle map or the Atlas of Texas Surface Waters (Publication Number GI-316), and refer to the first named receiving water on the map. If TCEQ develops a GIS-based map to assist in identifying receiving waters, this tool will be

made available on the agency's Web site and the Web address identified in the NOI.

Comment 225:

Travis County requests information on the scope of the conveyances and structures contributing to each outfall location that they must identify on the storm sewer map required by Part III.A.3.(c). They ask whether all above-ground and below-ground conveyances must be located and mapped for each outfall, or just contributing surface drainage inlets and/or watershed areas.

Response 225:

At minimum, the storm sewer map must include all of the regulated outfalls, all waters of the U.S. receiving discharges from the outfalls, and any information required to implement the SWMP. The MS4 operator may need to develop more detailed maps of conveyances in order to adequately implement an illicit discharge detection and elimination program. The Center for Watershed Protection has developed a guidance manual for this MCM that may be helpful to MS4 operators. This manual is available online at: *http://www.cwp.org/IDDE/IDDE.htm*.

Comment 226:

Carter & Burgess notes that the requirement in Part III.A.3.(c)(1)(i) related to the storm sewer map was changed from "major outfalls" to "all outfalls." Carter & Burgess states that it is not practicable for the MS4 operator to develop a map of all outfalls and states that this requirement is beyond the MEP standard for most MS4s. Harris County asks whether TCEQ intends the mapping of all outfalls or just those of a certain type or above minimum size. Harris County comments that the current language would require MS4 operators to map every pipe, swale, or conduit of any size that is placed by any number of entities into the MS4, and suggest revising the permit for consistency with 40 C.F.R. §122.26(d)(1)(B)(1), which states that only municipal storm sewer outfalls discharging into waters of the U.S. must be mapped. Russell Moorman requests revising the permit to require cities to map "major outfalls" rather than "all outfalls," which is consistent with the previously published draft permit. Russell Moorman states that a significant amount of additional resources are required to map the additional outfalls, and may not result in a significant improvement to water quality.

Response 226:

In response to comments regarding the definition of "outfall" the definition was revised to help clarify that as discussed in this permit an "outfall" refers to a discharge point from an MS4 into waters of the U.S. Outfalls that discharge into the MS4, such as a wastewater outfall from an industrial facility, are not included in this definition. TCEQ declines to revise the language, which is consistent with the federal regulations at 40 C.F.R. §122.34(b)(3)(ii), which require mapping of "all outfalls."

Comment 227:

Tarrant County and NCTRSW request clarification regarding how to determine the point of discharge to surface water in the state. The commenters request that TCEQ provide applicants access to a state or federal map, specific to the general permit, which names specific streams and other water bodies in order to map locations of all outfalls to surface water in the state (as listed in definitions) or waters of the U.S. (as listed in III.A.3.(c)(1)(ii)). Tarrant County, NCTRSW, and Grapevine suggest that TCEQ provide a state or federal map, such as TCEQ's TMDL River Basin maps or USGS Quadrangle sheets. Tarrant County and Grapevine note that the TMDL maps could be posted or emailed to download into a GIS. These commenters also note that Phase I individual permits issued by EPA were approved using USGS maps to delineate the boundary between the MS4 and waters of the U.S. If such a map is not designated by TCEQ, Tarrant County and Grapevine request changing the language regarding what outfalls must be mapped from "all outfalls" to "outfall locations adequate to conduct MS4 conveyance surveillance and illicit discharge tracing." Tarrant County and Grapevine comment on the difficulty that MS4 operators will face determining compliance without knowing what waters are designated as receiving waters.

Response 227:

The permit requires the MS4 operator to develop its outfall map using existing information such as federal or state maps and publications. MS4 operators can locate information regarding classified segment(s) receiving the discharges from the MS4 in the "Atlas of Texas Surface Waters" at the following TCEQ web address. This document includes identification numbers, descriptions, and maps: *http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-316/index.html*.

Information on unnamed receiving waters that are not listed as impaired may be found on USGS topographic maps or TxDOT County Maps, which are used in the TPDES program to delineate the discharge route of a particular facility (see 30 TAC §305.45(a)(6)). The EPA's Web site contains current information on the definition and court rulings regarding "waters of the U.S.," at: *http://www.epa.gov/owow/wetlands/guidance/SWANCC/* and this may be helpful in developing the required outfall map.

Comment 228:

Mathews & Freeland comment that the permit should make it clear that the storm sewer map can be developed during the permit term. Carroll & Blackman comments that the language in Part III A.3.(c)(2) should reflect the future tense rather than the past tense, and suggests the following language:

The SWMP must include the source of information (that) will be used to develop the storm sewer map, including how the outfalls will be verified and how the map will be regularly updated.

Response 228:

TCEQ recognizes that many MS4 operators will not complete the storm sewer system map prior to submitting an NOI and believes that changing the word "were" to "are" will help address both those MS4 operators that have completed this measure and those that will implement it during the permit term. In response to the comment, Part III A.3.(c)(2) was changed to: "The SWMP must include the source of information used to develop the storm sewer map, including how the outfalls are verified and how the map will be regularly updated."

Comment 229:

Universal City, HCEC, and TxDOT-Houston comment that the requirement to include the "source of information" used to develop the storm sewer map in the SWMP exceeds the federal requirements and that these sources cannot be identified prior to submitting the NOI. The commenters state that federal intent was for MS4 operators to begin MCM implementation after submitting the NOI. The commenters also state that the requirement to include a map update method is inappropriate, as MS4 operators may defer map preparation until later in the five-year implementation period. Mathews & Freeland comment that including the source of information used to develop the map would result in massive amounts of information being contained in the SWMP and recommend deleting Part III.A.3.(c)(2).

Response 229:

The SWMP that is submitted with the NOI for permit coverage must include a description of all six MCMs (and potentially the optional seventh MCM). Where elements of an MCM are not yet developed, the SWMP must include a schedule for developing them such that full implementation of the SWMP is accomplished within the initial five-year permit term. Therefore, the SWMP submitted with the NOI for authorization may address the lack of including a source of information used to develop a storm sewer map, by providing a description of the types of information evaluated, as well as a schedule for developing the required information.

Pollution Prevention/Good Housekeeping For Municipal Operations (moved to Part III.A.6. of the permit)

Comment 230:

TCCOS and Mathews & Freeland comment that the permit uses the term "municipal" throughout Part III.A.4.(now Part III.A.6) and elsewhere. However, small MS4s may include many public entities who are not municipalities. TCCOS and Mathews & Freeland believe the permit creates the impression that small MS4s who are not municipalities will not be required to implement those activities that are directed at municipal operations, and that this could lead to preferential treatment of MS4s owned by federal and state governments.

Response 230:

The permit was developed using terms established by EPA during development of the NPDES storm water permitting program and that are currently used by most other states administering the NPDES program. The permit contains a definition for MS4 to make it clear that it includes a system that may be owned or operated "by the United States, a state, city, town, borough, county, district, association, or other public body . . .." Additionally, TCEQ, EPA, and other groups have conducted numerous workshops and conferences providing information on the permitting program, while using the term "municipal" to describe these systems.

Comment 231:

DFW comments that Part III.A.4.(a) (now Part III.A.6.) states that controls must be used to reduce or eliminate the discharge of pollutants from municipal operations and asks whether MS4s such as airports have to comply with the requirements listed in the MSGP for industrial activities (TXR050000) and this permit, or can these facilities comply solely under the requirements set forth in this permit.

Response 231:

TPDES general permit TXR050000 authorizes discharges of storm water associated with industrial activities. Some of the municipal operations conducted by an MS4 operator may also require coverage under this separate storm water permit, such as the operation of a steam electric power generating plant. Where a storm water pollution prevention plan (SWP3) is already developed to comply with TXR050000 for these activities, the SWMP can provide a reference to the SWP3 in order to meet the requirements of this permit. It is not necessary to develop a duplicate or additional set of controls for these operations.

Comment 232:

Carroll & Blackman recommends replacing the phrase "structural and non-structural controls" with "structural and/or non-structural controls" in Part III.A.4.(a) (now Part III.A.6.(a)) since structural controls are not always necessary.

Response 232:

In response to the comment, the applicable sentence was changed to: "Housekeeping measures and BMPs (which may include new or existing structural or non-structural controls) must be identified and either continued or implemented with the goal of preventing or reducing pollutant runoff from municipal operations."

Comment 233:

Group 1 comments that the language in Part III.A.4.(b) (now Part III.A.6.(b)) is not clear and requires the inclusion of training materials in the SWMP, even though the permit allows an implementation time frame for development of the training program. Group 1 further states it is not feasible to provide information that is still in the development stage. Freese & Nichols requests removing from the initial SWMP submission the requirement to include training materials for good housekeeping and BMPs.

Response 233:

The SWMP submitted with the NOI for permit coverage must include a description of all six MCMs (and potentially the optional seventh MCM). Where elements of an MCM are not yet developed, the SWMP must include a schedule for developing them such that full implementation of the SWMP is accomplished within the initial five-year term of the permit. Therefore, the SWMP submitted with the NOI for authorization may address the lack of training materials by providing a description of the types of materials that are necessary and a schedule for developing those materials.

Comment 234:

Tarrant County comments that it appears that Parts III.A.4.(c), (d), and (e) (now Parts III.A.6.(c), (d), and (e)) are including requirements for the maintenance of structural controls, the disposal of waste associated with the maintenance of those controls, and a listing of all municipal operations subject to permitting requirements. Tarrant County and Grapevine comment that EPA only recommended these items in its model MS4 permit and the commenters recommend that the permit not go beyond the conditions included in the EPA's model MS4 permit. TCCOS and Mathews & Freeland also believe that this MCM exceeds the requirements of the EPA Phase II rule. TCCOS and Mathews & Freeland comment that TCEQ should not implement EPA suggestions as if they were requirements of the federal rule. Group 1 comments that the language in Part III.A.4.(d) (now Part III.A.6.(d)) elevates an EPA recommendation to a requirement and that waste disposal will become part of this MCM implementation, but the actual disposal is likely covered under other permit programs for waste disposal. Group 1 also comments that it should be the operator's decision whether to include this sort of language in its SWMP and requests deletion of this language.

Response 234:

The final Phase II federal regulations do not require MS4 operators to include structural control maintenance and solid waste disposal elements as a part of this MCM. However, the preamble to the Phase II regulations notes: "Ultimately, the effective performance of the program measure depends on the proper maintenance of the BMPs, both structural and non-structural. Without proper maintenance, BMP performance declines significantly over time. Additionally, BMP neglect may produce health and safety threats, such as structural failure leading to flooding, undesirable animal and insect breeding, and odors." (64 FR 68721, 687562 (1999)). The permit, like the federal rules, does not require structural controls, but requires performing maintenance of controls only if this type of BMP is used to satisfy this MCM. Listing all municipal operations that are subject to TPDES storm water permitting requirements is an important step in identifying areas of concern related to this MCM. This list will assist in making a determination of which discharges must meet specific discharge requirements.

Comment 235:

Group 1 comments that Part III.A.4.(e) (now Part III.A.6.(e)) pertains to development of the program and the elements included in the documentation of the program. Group 1 states that it is clearly not feasible to provide information that is not developed and requests changing the language from "the SWMP must include a list of" to "the documentation must include a list of."

Response 235:

The SWMP submitted with the NOI for permit coverage must include a description of all six MCMs (and potentially the optional seventh MCM). Where elements of an MCM are not yet developed, the SWMP must include a schedule for development such that full implementation of the SWMP is accomplished within the term of the permit. Therefore, the SWMP may simply "document" a schedule for developing these activities and for implementing them as long as full implementation of the MCM is completed within the initial five-year term of the permit.

Comment 236:

Fort Hood asks what regulations apply to the disposal of accumulated sediment, dredge spoil, or floatables listed in Part III.A.4.(d) (now Part III.A.6.(d)). Fort Hood asks whether these materials are automatically designated as a special waste if they came from a storm water detention pond or could they be disposed of as a regular municipal solid waste.

Response 236:

Solid waste disposal must comply with applicable TCEQ rules in 30 TAC Chapters 330 and 335. An MS4 operator may need to contact TCEQ's Waste Permits Division for specific questions on the disposal of particular types of waste. General information on waste permitting may be accessed on TCEQ's Web site at: *http://www.tceq.state.tx.us/subject/subject_waste.html*. Additional information on special waste is available on TCEQ's Web site at: *http://www.tceq.state.tx.us/permitting/waste_permits/waste_planning/msw_specialwaste.html*.

Comment 237:

Universal City, HCEC, and TxDOT-Houston state that the requirement in Part III.A.4.(d) (now Part III.A.6.(d)) to include procedures for waste disposal in the SWMP prior to submitting an NOI is inappropriate, as the federal intent was to begin MCM implementation after the NOI was submitted. Universal City, HCEC, and TxDOT-Houston state that operations and maintenance plans developed during SWMP implementation should contain these types of procedures.

Response 237:

The SWMP that is submitted with the NOI for permit coverage must include a description of all six MCMs (and potentially the optional seventh MCM). Where elements of an MCM are not yet developed, the SWMP must include a schedule for development such that full implementation of the SWMP is accomplished within the term of the permit. Therefore, the SWMP may simply "document" a schedule for developing these procedures and for implementing them, as long as full implementation of the MCM is completed within five years after the permit is issued.

Comment 238:

NCTCOG, Tarrant County, Cleburne, and Freese & Nichols request defining the term "industrial activity" as used in Part III.A.4.(e) (now Part III.A.6.(e)) in the permit. Tarrant County recommends using the language from the storm water MSGP to avoid confusion with non-regulated local government activities. Grapevine requests additional language in this section to further identify the industrial activities and specifically suggests inserting the word "industrial" after "TPDES" in order to better differentiate between the MS4 regulations and the existing industrial regulations.

Response 238:

In Part III.A.4.(e) (now Part III.A.6.(e)), the term "industrial activity" refers to industrial activities that are required to have storm water permit authorization according to 40 C.F.R. §122.26 under the Phase I storm water regulations. "Storm water discharge associated with industrial activity" is defined in 40 C.F.R. §122.26(b)(14) and adopted by reference in 30 TAC §281.25. The term includes discharges from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing, or raw material storage areas at an industrial site that falls into one of the listed standard industrial classification (SIC) codes. These industrial sites require coverage under the TPDES MSGP for storm water or under an individual TPDES permit. For clarity, TCEQ did revise the language to insert the term "industrial" after "TPDES."

Comment 239:

TxDOT comments that the NPDES CGP considers small and large construction activities as industrial activities and asks whether it is appropriate to assume that this section does not require the regulated community to report all CGP activities, whether large or small, that occur. TxDOT notes that these are often short term activities that may be completed before TCEQ reviews the NOI and requests clarification regarding what activities subject to TPDES regulations must be listed under Part III.A.4.(e) (now Part III.A.6.(e)) of the permit.

Response 239:

40 C.F.R. §122.26(b)(14)(x), includes large construction activities in its definition of storm water associated with industrial activity; however, the intent of this MCM is to address permanent facilities. Because the term "TPDES storm water regulations" was revised to "TPDES industrial storm water regulations," additional changes are not required, as the TPDES regulations differentiate between construction and industrial regulations. Part IV.B.2.(g) of the permit, related to the annual report, does require the MS4 operator to list the separate construction activities occurring within the regulated area. Additionally, the MS4 operator will also need to address construction activities in the fourth MCM (based on revised numbering) related to discharges from construction site runoff.

Construction Site Storm Water Runoff Control (now Part III.A.4. of the permit)

Comment 240:

Mathews & Freeland comment that the words "local law" are unclear. Does it mean that if a municipal charter or a municipal ordinance, which are local laws, prohibit a municipality from regulating discharges from construction sites, then the municipality does not have to develop, implement, and enforce such a program? Mathews & Freeland state that the limitation "to the extent allowable under State and local law" is counterproductive because it will further exacerbate land development just beyond municipal boundaries. Counties and other operators of small MS4s may lack the authority to regulate construction site runoff. Thus, all other things being equal, new land development will be more likely to occur outside of municipal boundaries. Additionally, many general and special law districts (such as water districts, MUDs, etc.) have the authority to regulate such discharges, but traditionally have not exercised such authority, and may lack the appropriate funding mechanisms. Mathews & Freeland ask if TCEQ expects such districts to regulate in place of counties merely because they have some "theoretical" power.

Response 240:

The language "to the extent allowable under State and local law" was included in the permit to emphasize that MS4 operators are not required to regulate or enforce MCMs beyond their authority. The provisions of the permit must be implemented to the MEP, but within the legal authority of the small MS4s.

Comment 241:

Tarrant County and NCTRSW request adding the following statement to the end of the paragraph under Part III.A.5.(a) (now Part III.A.4.(a)): "Where the permittee lacks the authority to develop ordinances or to implement enforcement actions, information regarding construction site violations may be referred to TCEQ's regional field office." TCUC, BCES, and Harris County comment that the permit should include specific information on how TCEQ will handle the program for counties that lack enforcement authority. TCUC and BCES request that this section include what is required in the way of notification between the county and TCEQ for small construction sites.

Response 241:

In response to earlier comments regarding Part III.A.3. of the permit, TCEQ added a second paragraph to Part III of the permit to address what MS4 operators must do if they lack the authority to enforce certain MCMs. That paragraph states that where the MS4 operator lacks the authority to develop ordinances or to implement enforcement actions, the MS4 operator must exert enforcement authority as required by the permit for its facilities, employees, and contractors. For discharges from third party actions, the MS4 operator must perform inspections and exert enforcement authority to the MEP. If the MS4 operator does not have enforcement authority and is unable to meet the goals of this permit through its own powers, then, unless otherwise stated in this permit, where possible, the MS4 operator should seek to enter into interlocal agreements with municipalities where the MS4 is located. These interlocal agreements would detail the extent the municipality will be responsible for inspections and enforcement authority in order to meet the conditions of the permit. If the MS4 operator is unable to enter into such inter-local agreements, and does not have enforcement authority, it may notify the TCEQ's Field Operations Division. No additional changes were made to specifically address the construction site runoff requirements, as TCEQ believes that the new language will address these concerns.

Comment 242:

Fort Hood asks what type of "sanctions to ensure compliance" listed in Part III.A.5.(a) (now Part III.A.4.(a)) are required for a federal facility.

Response 242:

The permit requires the MS4 operator to develop and implement the SWMP to the MEP. Federal facilities may have additional capabilities to enforce compliance with a permit condition that local governments do not have, but there may also be limitations that exist for a federal facility. Sanctions may include, issuing notices of violation, assessing fines for noncompliance, and requiring work to stop until the operator is in compliance. If an MS4 operator attempts to implement sanctions, but does not have the authority to initiate enforcement action, then the MS4 operator should attempt to enter into interlocal agreements with MS4s and where that is not possible, the MS4 operator may contact TCEQ's Field Operations Division to report noncompliance (see previous response).

Comment 243:

Part III.A.5.(b)(2) (now Part III.A.4.(b)(2)) requires controls on wastes at a construction site that may cause adverse impacts to water quality. DAFB asks what constitutes "adverse impacts to water quality."

Response 243:

An adverse impact to water quality includes the introduction of pollutants that cause or contribute to the violation of a water quality standard or degrade the quality of the receiving water. In the preamble to the final Phase II regulations EPA states: "Water quality impairment results, in part, because a number of pollutants are preferentially absorbed onto mineral or organic particles found in fine sediment. The interconnected process of erosion (detachment of the soil particles), sediment transport, and delivery is the primary pathway for introducing key pollutants, such as nutrients (particularly phosphorus), metals, and organic compounds into aquatic systems." (64 FR 68721, 68728 (1999)).

Comment 244:

TCUC and BCES ask how, since TCEQ is not requiring the operators of small construction sites to submit an NOI, does TCEQ expect to track the number of these sites.

Response 244:

The permit authorizing the discharge of storm water associated with construction activities, general permit TXR150000, requires the operators of small construction activities to provide a copy of the signed construction site notice to the operator of any MS4 that receives the discharge. The annual report the small MS4 must prepare for this permit requires it to report the number of non-municipal construction activities that occurred within the MS4's jurisdiction. The annual report also requires that the MS4 operator provide the number of small and large construction activities it has undertaken under the authority of this permit.

Comment 245:

Harris County and TAOC ask how TCEQ will regulate small construction sites that are not required to submit an NOI.

Response 245:

The regulations for large and small construction sites to protect water quality through the development of a comprehensive SWP3 are largely identical. Small sites differ from larger sites in that they may qualify for a waiver from this requirement if construction occurs during defined periods of time when there is a low potential for erosion. Also, for a number of reasons, including the fact that these activities will commence and conclude in a short period of time relative to larger construction activities, a construction site notice is required rather than submission of an NOI. You may refer to the following TCEQ Web site to obtain a copy of this permit, supporting fact sheet, and TCEQ's response to comments that contain the requirements and the supporting technical information: *http://www.tceq.state.tx.us/nav/permits/wq_construction.html*.

Comment 246:

Cleburne comments that the first paragraph of Part III.A.5. (now Part III.A.4.) suggests that the MS4 operator is required to take over TCEQ's responsibility for enforcement of the TPDES CGP. Cleburne comments that if this is the intent of the language it creates an unfunded mandate being passed down to the citizens of local communities to fund. Costs to enforce the permit should not be passed on to citizens because MS4 operators do not have the money available and will not receive any of the fees generated by the TPDES construction permit. Therefore, Cleburne recommends deleting this initial paragraph and keeping the responsibility for enforcing compliance with the CGP with TCEQ. Cleburne suggests that Part III.A.5.(a) (now Part III.A.4.(a)) begin with: "The MS4 operator's program must include the development and implementation of, at a minimum, an ordinance or other regulatory mechanism to require erosion and sediment and waste management plans, as well as sanctions to ensure

compliance, to the extent allowable under State and local law." TCCOS and Mathews & Freeland believe TCEQ lacks the statutory and constitutional authority to force municipalities to regulate the conduct of third persons. Furthermore, the regulatory controls envisioned by the control measure are fully within TCEQ's regulatory jurisdiction. TCCOS and Mathews & Freeland comment that TCEQ should not push its statutory obligations off onto other governmental entities, without providing the funding needed to implement these obligations. Therefore, TCCOS and Mathews & Freeland strongly object to this MCM. Lloyd Gosselink requests deleting this requirement from the permit because it is overly burdensome for many small MS4s and it requires the MS4s to enforce TCEQ's requirements of the CGP, TXR150000, since the construction sites over one acre are required to obtain coverage under the TPDES CGP.

Response 246:

TCEQ is the permitting authority for the NPDES program in the State of Texas and is the responsible agency for issuing and enforcing TPDES permits. TCEQ is not delegating permit authority for the TPDES CGP, TXR150000. The requirements for this MCM in the permit follow the federal regulations at 40 C.F.R. §122.34(b)(4), which state: "You must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to your small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre." The program requirements in the permit are also directly from the federal regulations at 40 C.F.R. §122.34(b)(4)(ii)(A) to (F). This MCM consists of requirements developed by the MS4 operator to ensure that discharges from the permitted storm sewer system do not cause an adverse impact to water quality in receiving waters. The MS4 operator must develop procedures to inspect construction sites to make certain that construction site SWP3s are properly implemented. The MS4 operator may additionally choose to develop local requirements and conditions through an ordinance to account for local water quality issues. Additionally, as part of the illicit discharge and detection MCM, MS4 operators need to ensure that storm water contributions from construction activities subject to TPDES permitting have the necessary authorization.

Comment 247:

Cleburne believes that because of the potentially large number of construction sites that may be ongoing in an MS4, formal site inspections at each location would overwhelm the staffing capabilities of small MS4s. Therefore, Cleburne comments that requiring site inspections by the municipality at only those locations that are contributing pollutants to the MS4 is a more effective and less costly way to reduce pollutant loadings. Cleburne suggests the following language for (b)(3): "site inspection and enforcement of erosion and sediment control measures for construction sites that are contributing pollutants to the MS4."

Response 247:

MS4 operators are not required to inspect all construction sites that contribute storm water associated with construction activities to their MS4. Procedures for inspections must be developed by the MS4 operator, but the procedures may allow for focused inspections. The suggested language is not necessary, as the first sentence in Part III.A.4. indicates that the purpose of this MCM is to reduce pollutants in storm water runoff from construction sites that enter the permitted MS4 through local government regulation, such as ordinances.

Comment 248:

Harris County requests revising the requirement to develop a mechanism to require erosion and sediment controls to require adherence to the TPDES CGP. Harris County requests revising the language in Part III.A.5.(b)(1) (now Part III.A.4.(b)(1)) to clarify that construction site contractors must implement erosion and sediment control BMPs in compliance with the TPDES CGP. Similarly, Harris County requests revising the language in (b)(2) to clarify that construction site contractors must control wastes at the construction site that may cause adverse impacts to water quality in compliance with the TPDES CGP.

Response 248:

Where the MS4 operator concludes that compliance with the TPDES CGP is adequate to protect the quality of discharges from the MS4, the MS4 operator can establish that construction site operators need only comply with the requirements of that general permit. Alternatively, the permit allows MS4 operators who may require additional or more specific controls to address local water quality issues or other area specific concerns.

Post-Construction Storm Water Management in New Development and Redevelopment (now Part III.A.5. of the permit)

Comment 249:

TCUC, Harris County, TAOC, and BCES comment that the permit should include specific information on how TCEQ will handle post-construction storm water management for new developments and redevelopments for counties who lack enforcement authority. Mathews & Freeland comments that the phrase "to the extent allowable under State and local law" is an open invitation for abuse by non-municipalities and that TCEQ should at the very least provide the regulated community with a list of entities that lack authority under state law.

Response 249:

This MCM is developed by the MS4 operator with emphasis on local growth patterns and flood control issues, as well as water quality issues. Many of the program elements that an MS4 operator could choose to develop for this MCM may not be directly related to the TPDES permit requirements of a contributor to the MS4 and not directly related to activities that fall under the scope of TWC, Chapter 26. However, to comply with the permit it is a requirement that the MS4 operator develop this MCM such that discharges from the MS4 are protective of water quality. TCEQ does not require counties to regulate third parties beyond their authority. If a county lacks the authority to enforce controls that would prevent or minimize water quality impacts, it can request the entity causing the discharge to discontinue. If they will not voluntarily comply, the county may report suspected violations to TCEQ by calling the Environmental Violations Hotline at 1-888-777-3186 or their local regional office and use TCEQ enforcement authority.

The language "to the extent allowable under State and local law" was included in the permit to emphasize that MS4 operators are not required to regulate or enforce MCMs beyond their statutory and regulatory authority. The provisions of the permit must be implemented to the MEP, but within the legal authority of the small MS4s.

Comment 250:

Fort Hood requests revising the second sentence of Part III.A.6. (renumbered as Part III.A.5.) as follows, and also requests further guidance regarding the standard that TCEQ expects MS4 operators to attain. According to Fort Hood, additional guidance on this item, such as what types and how many controls are needed to satisfy the requirement, would assist in achieving consistent interpretations among MS4 operators and suggests the following language: "The program must ensure that permanent controls will be in place as needed, to prevent or minimize water quality impacts."

Response 250:

TCEQ declines to revise the language, which was incorporated directly from 40 C.F.R. §122.34(b)(5), relating to what is re-

quired of a regulated MS4 operator. TCEQ recommends that MS4 operators access the EPA's National Menu of BMPs (see *http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm*), which were adopted by TCEQ, for additional guidance on this MCM.

Comment 251:

Carter & Burgess comments that the language for this MCM is much less detailed than the EPA model general permit, which makes it almost impossible for a small MS4 operator to determine the actual goal of the MCM. In EPA's materials relating to this control measure, EPA seeks post-construction site BMPs that will reduce discharges and pollutants in an "attempt to maintain pre-development runoff conditions."

Response 251:

The permit requirements are taken directly from the final federal Phase II regulations at 40 C.F.R. §122.34(b)(5) and adopted by reference in 30 TAC §281.25. Additionally, the federal regulations contain guidance on development of this MCM. This guidance was incorporated in the EPA model permit. Although that guidance was not adopted by reference in 30 TAC §281.25, and was not included in this permit, control measures developed with consideration for the guidance could satisfy this provision of the permit. Currently, the permit language is flexible enough to allow a small MS4 operator to utilize this guidance or other resources and approaches to development of this MCM.

Comment 252:

Cleburne believes writing ordinances addressing post-construction runoff is difficult to achieve and to update as new BMP technology evolves. Cleburne comments that incorporating discussions of post-development runoff in plan review would allow engineers more innovative options when developing BMPs than what restrictive ordinances might allow. Instead, Cleburne believes MS4 operators should reference policies and ordinances already in place or planned for phase-in within the permit term in the SWMP. Cleburne suggests the following permit language: *(b) Specify mechanisms in the plan review process, design criteria or any ordinances which address post-construction runoff from new development and redevelopment projects; and . . ..*

Response 252:

The MS4 operator should regularly update and revise the SWMP since the universe of storm water BMPs and controls is rapidly evolving. As improved controls are identified, developed, and included by the MS4 operator within MCMs, revision or amendment of local ordinances may also be necessary. Strict, prescriptive local ordinances may not be necessary where other mechanisms exist, such as a building permit process where post-construction controls can be considered and agreed upon by the MS4 operator and the developer. The SWMP may reference existing ordinances, building and design criteria, and other local controls that already meet or contribute to the goal of this MCM.

Comment 253:

TCCOS and Mathews & Freeland comment that this MCM requires small MS4 operators to develop, implement, and enforce a regulatory program. In the opinion of TCCOS and Mathews & Freeland, TCEQ lacks the statutory and constitutional authority to force municipalities to regulate the conduct of third persons. TCCOS and Mathews & Freeland comment that TCEQ expressly seeks to conscript local land use authority. TCCOS and Mathews & Freeland strongly object to this MCM and recommend that TCEQ adopt the following language, which they believe accomplishes the goal of making local land use decisions with an awareness of water quality impacts that might result from such decisions:

6. Post Construction Storm Water Management in New Development and Redevelopment

The MS4 operator must:

(a) Review existing programs addressing storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale that will result in the disturbance of one or more acres, that discharge into the small MS4;

(b) Study the feasibility of new projects to prevent or minimize water quality impacts resulting from storm water runoff including a combination of structural and/or non-structural BMPs appropriate for your community;

(c) Formally consider implementing programs, appropriate to your community to prevent or minimize water quality impacts resulting from storm water runoff; and

(d) Ensure adequate long-term operation and maintenance of structural controls that are owned or operated by the operator of the MS4.

Response 253:

The requirement to develop this MCM is a requirement that the MS4 operator consider contributions of storm water runoff from areas of new development and redevelopment and to develop pollution prevention measures that reduce pollutants in these discharges. The permit requirement is flexible and provides the opportunity for the MS4 operator to establish BMPs that address local water quality issues, growth patterns, and other factors. The MS4 operator also has the flexibility to require or to encourage the use of these measures wherever they are appropriate. The requirements in the permit for this MCM are consistent with 40 C.F.R. §122.34(b)(5). As stated in previous responses, TCEQ is not requiring small MS4s go beyond their statutory and regulatory authority.

Comment 254:

DAFB states that Part III.A.6.(b) (now Part III.A.5.(b)) mentions "to the extent allowable under state and local laws" and requests revising this subpart of the permit to include citations for the appropriate state laws.

Response 254:

TCEQ declines to attempt to cite all state laws that might constrain an MS4 operator's use of ordinances or other regulatory mechanisms to address post-construction runoff from new development or redevelopment within the permit because of the difficulty in tracking changes to the law.

Comment 255:

Lubbock asks whether the MS4 operator can legally ensure adequate long-term operation and maintenance of BMPs, as required in Part III.A.6.(c) (now Part III.A.5.(c)), if the operator has already submitted an NOT. Lubbock suggests replacing the term "long term" with "for life of TPDES Construction Permit."

Response 255:

Since this item refers only to post-construction runoff control in new development and redevelopment, and does not apply to discharges regulated under the TPDES CGP, TCEQ declines to revise the language to reference the TPDES CGP. Guidance on how an MS4 operator can ensure long-term operation and maintenance of BMPs is available from the National Menu of BMPs at: *http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm*, which were adopted by TCEQ.

Authorization for Municipal Construction Activities

Comment 256:

NCTCOG expresses concern that if the day-to-day operation control component is strictly interpreted an MS4 operator may not meet the definition of construction site operator when an MS4 uses a construction contractor rather than internal resources.

Response 256:

The MS4 operator can best define itself as the construction site operator by specifying its role within the contracts or other binding agreements with the contractors, and within the language of the SWP3 that is developed for the construction activity. In some instances, based on the relationship between the MS4 operator and the contractors/subcontractors, the MS4 operator will be able to authorize the construction activity under this permit, and in other instances, separate authorization may be required under the TPDES CGP.

Comment 257:

Tarrant County requests removing Part III.A.7.(a)(i) because the information required in Part III.A.7.(a)(iv) is sufficient, as the SWP3 will include the information requested in item (i).

Response 257:

Some information in items (i) and (iv) are similar. However, the language was not revised, because the requirement to describe how construction is conducted and how storm water plans are developed is unique and necessary to ensure that this MCM is met. While item (i) may include more technical information regarding BMPs that are considered and used for construction, item (iv) may include information about who will develop, review, and implement the SWP3 for each construction site.

Comment 258:

Cleburne requests revising Part III.A.7.(a) and (b) to "If the MS4 opts to include municipal construction activities, then the MCM must include . . .."

Response 258:

The first sentence in the opening paragraph of this MCM at Part III.A.7. states that the development of an MCM is an optional measure. Therefore, it is not necessary to reiterate that this is an option in the later language.

Comment 259:

Tarrant County requests deleting the requirement to provide information within the MCM on how construction activities are conducted with regard to local conditions. Tarrant County comments that the information required to satisfy Part III.A.7.(b) of the permit already requires providing this information in the construction SWP3.

Response 259:

If the MS4 operator chooses to include this optional seventh MCM under the provisions of the permit, a general description of how the MS4 operator will, in general, conduct construction activities for construction sites it operates must be included in the MCM and included as part of the SWMP. Then, for each separate construction activity, the MS4 operator must develop an SWP3 that describes in detail how pollution prevention measures are provided, with consideration for the site-specific conditions, to reduce pollution in runoff at each site. TCEQ considered a number of limiting regulatory factors in order to provide the optional MCM. 40 C.F.R. §122.26(c)(ii) requires an operator of an existing or new storm water discharge for a small construction activity provide a narrative description of the following: 1) the location, including a map, and the nature of the construction activity; 2) the total area of the site and the area of the site that is expected to undergo excavation during the life of the permit; 3) proposed measures, including BMPs, to control pollutants in storm water discharges during construction, including a brief description of applicable state and local erosion and sediment control requirements; 4) proposed measures to control pollutants in storm water discharges that will occur after construction operations are completed, including a brief description of applicable state or local erosion and sediment control requirements; 5) an estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material, and existing data describing the soil or the quality of the discharge; and 6) the name of the receiving water.

In this instance, since an NOI is not required for each separate construction activity conducted by the MS4 operator, the information from 40 C.F.R. §122.26(c)(ii) must be provided within the SWMP submitted with the NOI for coverage under this permit. Providing the requested general information on the MS4 operators' approach to pollution prevention at their construction sites satisfies this federal regulatory requirement. Providing the requested specific information in the development of the SWP3 for each site ensures that the SWP3 is based on site-specific conditions and is appropriate to prevent or reduce pollutants in storm water runoff from each construction site.

General Requirements

Comment 260:

Tarrant County and Grapevine suggest deleting this section because the required rationale statement describing how BMPs and measurable goals were selected is background material that is not directly related to the primary goal of improving water quality.

Response 260:

TCEQ declines to remove this language and believes that including a rationale statement regarding the selection of BMPs will aid both the MS4 operator and TCEQ in evaluating the process used to select the chosen BMPs, as well as preventing duplication of effort when assessing the need for new or different BMPs.

Recordkeeping

Comment 261:

Cleburne asks under what circumstances would an extension of the recordkeeping requirement be requested and the process for requesting one. Cleburne suggests including in the permit potential reasons and examples of when an extension is required. Cleburne asks if extensions would be granted on a case-by-case basis with official notification by the executive director directly to the permit holder. If the required records retention time frame is extended, NCTCOG and Farmers Branch ask how the executive director will notify the MS4 operator. NCTCOG and Farmers Branch request that the permit language include a statement that the requirement to maintain records for a specific length of time will be triggered by, or contingent upon, the MS4 receiving notification from the executive director. Group 1 comments that the records retention period of three years is sufficient to allow for inspection or availability of records and request deleting the following sentence: "This period may be extended by request of the Executive Director at any time." DAFB requests clarification regarding the record retention period and extension of the retention period. DAFB comments that the permit, as currently written, appears to allow for the possibility of an MS4 operator to discard "all records the day after the expiration of this five-year permit, since five years is longer than three years."

Response 261:

The rules in 30 TAC Chapter 205 require that a general permit contain "adequate monitoring, recordkeeping, and reporting appropriate to the

type of activity authorized." (30 TAC §205.2(a)(5)(A)). The period of time specified in the permit is consistent with other TCEQ rules, such as 30 TAC §319.7(c), which requires retaining all records and information related to monitoring activities for a minimum of three years. For the purposes of this permit, the MS4 operator would receive in writing any additional retention requirements beyond three years or the remainder of the term of the permit.

The purpose of this provision is to require a minimum record retention time, and based on the permit language, the MS4 operator could discard records over three years old on the day after expiration of the permit. However, Part IV.A.4. of the permit also states that the retention period for maintaining records is automatically extended to the date of final disposition of any administrative or judicial enforcement action brought against an MS4 operator.

Comment 262:

Regarding Part IV.A.1., Lubbock asks if it is possible to implement a cap of five years for all recordkeeping. Lubbock asks what is required if the general permit is not renewed after five years and notes that there are several Phase I cities that are operating under existing NPDES permits that are more than five years old.

Response 262:

In response to the comment, the first sentence in Part IV.A.1. was revised to: "The permittee must retain all records, a copy of this TPDES general permit, and records of all data used to complete the application (NOI) for this general permit and satisfy the public participation requirements, for a period of at least three years, or for the remainder of the term of this general permit, whichever is longer." If the MS4 operator submits an NOT, or if the general permit is not renewed, then records must be retained for three years following termination of coverage.

Reporting

Comment 263:

NCTCOG and Farmers Branch request that the language "Unauthorized Discharge Notification" in Part IV.B.1.(a) be used instead of "Noncompliance Notification."

Response 263:

The term "noncompliance notification" is used because a permit violation may include actions other than unauthorized discharges.

Comment 264:

Harris County and Missouri City request revising the 24-hour reporting requirement for any noncompliance that may endanger human health or safety or the environment to five days in Part IV.B.1.(a). Harris County, Missouri City, and HCFCD state that the 24-hour requirement is very burdensome for municipalities with a new program. Harris County, Missouri City, and HCFCD also state that some MS4s may have many levels or many departments that will need guidelines and training developed to identify potential noncompliance, identify internal reporting structures, and develop clear reporting guidelines that are part of SWMP implementation. Harris County, Missouri City, and HCFCD indicate that in some instances noncompliance results from the actions of third parties or occurs on weekends. Missouri City and HCFCD request deleting Part IV.B.1.(a), relating to noncompliance notification.

Response 264:

The language in Part IV.B.1.(a) states that the noncompliance report must be provided to TCEQ "within 24 hours of becoming aware of the noncompliance." When the noncompliance occurred is immaterial; the 24-hour reporting deadline begins to run when the MS4 operator becomes aware of noncompliance that threatens human health or safety or the environment. The language in the permit is consistent with TCEQ rules in 30 TAC Chapter 305 (Consolidated Permits). The 24-hour reporting requirement is a standard permit condition for all permits issued under this chapter. 30 TAC §305.125(9)(A) states that a "permittee shall report any noncompliance to the executive director which may endanger human health or safety, or the environment" and further requires providing such information orally within 24 hours of the time the MS4 operator becomes aware of the noncompliance.

Comment 265:

Grand Prairie states that Part IV.B.1.(a) of the permit, related to noncompliance notification, does not state whether notification is due from the regulated entity when it receives illicit discharges through its outfalls. Grand Prairie states that "the MS4 in essence does not create noncompliance with exception to its municipal facilities and sanitary sewer collection system." Grand Prairie further states that making the MS4 responsible for all noncompliance whether it is the cause is an undue burden.

Response 265:

This permit requirement is specifically related to portions of the permit that are violated by the permitted entity and would not include illicit discharges if the MS4 operator met its permit obligations under an approved SWMP.

Comment 266:

Cleburne believes that because the permit does not contain numeric effluent limits, having a requirement for notification of noncompliance under 30 TAC §305.125(9) is inappropriate and requests deletion of this section. Cleburne comments that 30 TAC §305.125(9) is referring to TPDES discharge permits that have "unanticipated bypasses that exceed established effluent limits," or violations of "maximum daily discharge limits." Furthermore, under the illicit discharge requirements, the MS4 operator already has an obligation to detect and eliminate any illicit discharges that are found. Discovery of these discharges would constitute compliance with the permit, so they would not require notification. Cleburne comments that if notification of these discharges was the intent of this section, it is not consistent with the requirements of 30 TAC §305.125(9). Additionally, notification of discharges discovered would yield a substantial number statewide, and would overwhelm TCEQ with paperwork without providing any substantial improvement in water quality since the reported discharges will be eliminated.

Response 266:

The permit contains numeric effluent limitations for discharges from concrete batch plants where the MS4 operator chooses to develop the optional seventh MCM. Violations of these numeric limitations may be subject to the reporting requirements of 30 TAC §305.125(9). Therefore, the requirement for noncompliance notification is included in the permit.

Comment 267:

GCHD asks what the guidelines are that define a noncompliance event that may endanger human health or safety.

Response 267:

This requirement is a standard provision contained in all TPDES individual wastewater and storm water permits. There is no set or established guidance on what may constitute an endangerment to human health or safety. Discharges of storm water runoff through a permitted MS4 are not expected to constitute an event that may endanger human health and safety. However, as an example, there are cases where spills were purposefully washed into an MS4 with the mistaken belief that the

system drained to a treatment plant. This would constitute noncompliance with the terms of the permit and depending upon the nature of the material discharged it may or may not constitute an endangerment to human health or safety.

Comment 268:

GCHD asks whether notification may be sent to TCEQ via email.

Response 268:

TCEQ rules currently do not provide for noncompliance notification by email, but the agency is developing a system for electronic reporting that may affect some TPDES storm water permitting programs in the future.

Comment 269:

Houston requests TCEQ clarify whether this section only applies to noncompliance with the requirements of this permit or noncompliance with any federal, state, or local statute, regulation, ordinance, or rule.

Response 269:

This section applies only to a noncompliance with this permit that may endanger human health, safety, or the environment.

Comment 270:

Universal City, HCEC, and TxDOT-Houston suggest changing the requirement to submit documentation of training activities with a requirement to summarize the training activities and achievement of associated measurable goals and deadlines in tabular form in Part IV.B.2. The commenters state that the MS4 operator should maintain supporting documentation and making this revision would facilitate streamlined reporting, TCEQ review, and less cumbersome submissions. HCEQ, TxDOT-Houston, and Universal City state that requiring documentation in the annual report exceeds federal requirements found at 40 C.F.R. §122.34(g)(3). Mathews & Freeland comments that the permit requires the annual report to include progress towards achieving the statutory goal of reducing the discharge of pollutants by the MEP and an evaluation of the success of the implementation of the measurable goals, which are not required by 40 C.F.R. §122.34.

Response 270:

This MCM requires that the MS4 operator include examples or a description of training materials used. The annual report requirement requires submitting general information assessing compliance with each MCM, but does not require submitting every piece of documentation associated with the SWMP to TCEQ. In order to insure that the annual report remains concise, the MS4 operator would benefit from describing the efforts to meet the requirements of each MCM, and including tables and examples as needed for clarity. TCEQ believes this requirement is consistent with 40 C.F.R. §122.34(g)(3), which requires annual reports to include: 1) the status of compliance with permit conditions, an assessment of the appropriateness of your identified BMPs and progress towards achieving the identified measurable goals for each MCM; 2) results of information collected and analyzed, including monitoring data, if any, during the reporting period; 3) a change in any identified BMPs or measurable goals for any of the MCMs; and 4) notice that an MS4 is relying on another governmental entity to satisfy some permit requirements, if applicable.

Comment 271:

Carroll & Blackman requests replacing the third sentence of the first paragraph in Part IV.B.2., related to the reporting period with the following language, in order to coincide with the date TCEQ approves the NOI and SWMP. Carroll & Blackman notes that the change would allow the MS4 operator the opportunity to make any changes to the SWMP that are required based on the review of the SWMP by TCEQ: "The first calendar year for annual reporting purposes shall begin when the MS4 operator receives a notification of SWMP approval from TCEQ."

Response 271:

In response to the comment, TCEQ revised the permit to require annual reporting periods to correspond with the permit years. In other words, year one will start on the day this permit is issued and will end one year later. The annual report is due 90 days after the end of permit year one. This requirement will allow each annual report to cover one year of SWMP implementation. At the end of the fifth annual reporting period, the SWMP should be fully implemented. In subsequent permit terms, the permit may only require reporting in permit years two and four, as allowed by 40 C.F.R. §122.34(g)(3). Utilizing permit years rather than calendar years during the first permit term will better facilitate this transition. TCEQ declines to delay submitting the annual reports based on the approval date of the application. Because the permit requires full implementation of the SWMP during the five-year permit term, it is appropriate to require an annual report to cover the full year beginning the date the permit is issued. By the end of permit year one, if the permittee has not yet implemented any portion of the SWMP because the NOI and SWMP have not been approved by TCEQ, then the permittee may so indicate in the annual report. In response to the comment, Part IV.B.2. of the permit was revised to add the following sentence after the list of information to be included in the annual report: "An annual report must be prepared whether or not the NOI and SWMP has been approved by the TCEQ. If the permittee has either not implemented the SWMP or not begun to implement the SWMP because it has not received approval of the NOI and SWMP, then the annual report may include that information."

Comment 272:

V&E comments that the sub-provisions in Part IV.B.2. appear overly broad and unduly burdensome, especially item (a), in terms of scope and the work that must be performed when viewed against the benefit gained by the MS4 operator. V&E asks to what extent each of these items is required of Phase I MS4 operators. V&E requests a detailed rationale, including citation to legal authorities, for these requirements. TCCOS and Mathews & Freeland recommend revising this provision to: "The status of the compliance with permit conditions, an assessment of the appropriateness of your identified BMPs, and progress towards achieving your measurable goals for each of the MCMs." TAOC comments that (a) through (f) should be required only if there is a change from the initial plan. Group 1 comments that the language implies that monitoring or studies will be conducted to assess the progress towards reducing the discharge of pollutants and requests modifying the language as follows: "The status of compliance with permit conditions, an assessment of the appropriateness of your identified best management practices and progress towards achieving your identified measurable goals for each of the minimum control measure." Lloyd Gosselink states that the requirements listed in Parts IV.B.2.(g) and (h) of the permit, which require the annual reports to include the number of construction activities within each MS4 operator's jurisdiction, exceeds the federal requirements and is overly burdensome. Lloyd Gosselink states that the permit does not indicate why this requirement is needed, and requests deleting the provision.

Response 272:

Phase I MS4 operators are authorized under individual storm water permits. These permits were drafted with conditions specific to each of the Phase I MS4 operators so the requirements and specific permit language are varied. With respect to the requirements of Part IV.B.2.(a), the federal storm water regulations at 40 C.F.R. §122.34 (g)(3) state that

small MS4 operators must submit an annual report and that the contents of the report must include: "The status of compliance with permit conditions, an assessment of the appropriateness of your identified best management practices and progress towards achieving your identified measurable goals for each of the minimum control measures." In addition to subsection (a), the reporting requirements in (e), (f), and (j) are specifically required in 40 C.F.R. §122.34(g)(3). The requirements in subsection (b) and (j) are required only if applicable. Subsection (c) is an optional inclusion in the first year report only. Subsection (d) requires a summary of the results of information collected and analyzed only if such information is actually collected.

Subsection (g) and (h) ask for the number of municipal and non-municipal construction activities that occurred within the jurisdiction of the MS4. Operators of construction activities who discharge to an MS4 are required to submit NOIs or site notices to the operator of any MS4 receiving the discharge. Because the CGP already requires that dischargers submit this information to the MS4, requiring the MS4 to include the number of forms received is not overly burdensome. It will also allow the MS4 to obtain information on the number of activities that are occurring within their jurisdiction and to revise their BMPs if needed to address compliance. For example, if the MS4 operator does not receive any construction NOIs or site notices, yet observes multiple construction activities discharging into its system, then the MS4 operator may direct a portion of its program to provide additional information to construction site operators about the requirements of the CGP. Finally, since only large construction operators will submit NOIs to TCEQ, this requirement may allow TCEQ to better evaluate whether existing control measures are appropriate for the total areas of disturbed surfaces and to obtain additional information on the number of small construction sites discharging under the CGP.

Comment 273:

Dodson comments that an unstructured annual report will not provide TCEQ with enough information to properly administer and evaluate the effectiveness of the program and requests that TCEQ develop and standardize an Annual Report form that will give TCEQ the information it needs.

Response 273:

The current requirements allow great latitude for MS4 operators to develop an annual report that best serves their needs and that will summarize their SWMP activities. At this time, a required annual report format is not included in the permit. However, after reviewing a number of these reports from the many different types of MS4 operators, the executive director may determine it appropriate or necessary to develop and provide a standard or template report format as a resource.

Comment 274:

TAOC comments that the term "concise" is not defined as it relates to the annual report, and notes that the stakeholders group for the Phase II MS4 general permit recommended ten pages or less. Dodson comments that EPA's initial guidance was that a two to four page standard report form is adequate.

Response 274:

A specific range of pages for the annual reports is not required, since each MS4 operator will have unique information to submit. It is appropriate to leave the length of the annual report flexible so each MS4 operator can include its unique site-specific information.

Comment 275:

DAFB requests clarification of Part IV.B.2.(g) regarding how an MS4 operator determines the number of municipal construction activities authorized under the permit and what comprises a construction activity. DAFB asks if one large project that has five components is considered a single activity or five different construction activities. DAFB also asks what if the individual components take place over a period of several years?

Response 275:

MS4 operators that conduct construction activities under this permit are required to post a construction site notice, Attachment 1 of the permit, at each of the construction sites. Therefore, the MS4 operator may simply total the number of construction sites where notices were posted in order to determine the number of activities authorized. Construction activities may not be contiguous or may occur over a period of years and still be considered a single activity if they are part of a common plan of development. A common plan of development is a construction activity that is completed in separate stages, separate phases, or in combination with other construction activities. A common plan of development is identified by the documentation for the construction project that specifies the scope of the project and may include plats, blueprints, marketing plans, contracts, building permits, a public notice or hearing, zoning requests, or other similar documentation and activities.

Comment 276:

Group 1, Lloyd Gosselink, and Carroll & Blackman request deletion of the language in Part IV.B.2. that requires a small MS4 to include in their annual report the number of municipal activities that occurred within the jurisdiction of the small MS4 operator and the total number of acres disturbed, and the number of nonmunicipal construction activities that occurred within the jurisdiction of the MS4 operator because this information is not required by the federal rules. Lloyd Gosselink and Carroll & Blackman believe this provision is unnecessary and overly burdensome.

Response 276:

The provision to allow authorization of MS4 operator construction activities under this permit was proposed as a more efficient and less expensive manner of authorizing these activities. The alternative authorization is to apply for coverage under TPDES CGP, TXR150000. The application process for large construction activities under TXR150000 requires submitting an NOI and a $100 application fee for each construction activity that is authorized. The NOI for coverage under TXR150000 requires the applicant to provide the number of acres disturbed. Therefore, this same information is provided, regardless of whether authorization is sought under TXR150000 or under the optional seventh MCM. For MS4 operators that do find the annual summary report a burden, the option of authorizing these activities under the CGP remains. The permit also retains the requirement to include the number of non-municipal construction activities, which is appropriate as discussed in Response 272 and 277.

Comment 277:

Cleburne recommends deleting Part V.B.2.(h) (now Part IV.B.2.(h)) because it obligates the MS4 operator to track TPDES permit compliance for TCEQ, even though the MS4 operator does not have the authority to require or authorize storm water construction permits. Cleburne asks how a municipality would determine the number of construction activities if construction site operators will not be required to submit NOIs to the MS4 operators and small sites are not required to submit NOIs to TCEQ. Does TCEQ want the number of building permits issued, even though many of these would not have earth disturbing activities and others would not meet acreage requirements that require TPDES permitting? Additionally, Cleburne comments that many earth-disturbing activities do not involve the municipality issuing permits, so there is no means of tracking these activities. Cleburne comments that, be-

cause it is TCEQ's responsibility to authorize and issue the TPDES general permit for construction activities, the ability and responsibility of tracking this program lies with the state. Lloyd Gosselink and Carroll & Blackman believe this provision is unnecessary and overly burdensome. TAOC comments that the permit should not include a general requirement for non-municipal construction activities, because counties are not authorized to conduct non-municipal construction activities or to track and report such activities. Group 1, TCCOS, and Mathews & Freeland request deleting this requirement because is not required by the federal rules.

Response 277:

This permit requires the operators of all regulated MS4s to develop, implement, and enforce an SWMP to reduce pollutants in storm water discharges from the MS4 to the MEP. It was determined that construction site runoff is a significant potential contributor of pollutants to storm water runoff. Therefore, the federal regulations include an MCM requirement to address these discharges in the Phase II final regulations for small MS4s. Also, the permit contains provisions that the MS4 operator must control runoff from these sites, but only if that runoff enters its MS4. The TPDES CGP requires all regulated construction site operators to submit copies of either the NOI or the construction site notice to the MS4 operator, but only if the discharge enters that MS4. Receiving these notifications will assist MS4 operators in implementing this MCM by identifying construction activities that are regulated under a TPDES permit and that should have adequate controls in place. It will also assist in identifying sites that do not have TPDES authorization and that may be a significant contributor of pollutants or even an illicit discharge to the MS4. Therefore, the requirement to summarize the number of NOIs and construction site notices received within the annual report is intended for use as one measure of the MS4 operator's construction site storm water runoff control MCM.

Comment 278:

Cleburne comments that a single, systemwide report provided by multiple MS4 operators is beneficial because it would cut down on reporting requirement costs and workloads, but there is no option for co-permitting given under Part II.E., Permitting Options. As currently written, there is little incentive to participate in a watershed based SWMP. TxDOT comments that the language in this section suggests that co-permitting and shared annual reports are allowable and requests clarification. TxDOT also asks who TCEQ will hold accountable for deficiencies in shared annual reports, if those are allowed.

Response 278:

As indicated in a previous response to comments, TCEQ supports using the mechanism of a shared SWMP or shared program elements. The difference between the concept raised in the federal rules and the requirements established in this permit is that TCEQ will require submission of individual NOIs and SWMPs, as well as individual copies of the annual reports signed and certified by the MS4 operator who submits it. Since annual reports will be submitted for each regulated MS4 operator, that operator will be responsible for the accuracy and completeness of the report for its MS4.

Standard Permit Conditions

Comment 279:

TCUC and TAOC request adding language to the permit requiring TCEQ to provide a method of negotiating amendments to the SWMP, including an appeals process, if TCEQ requires additions or modifications of the SWMP.

Response 279:

TCEQ may require amendments to the SWMP; however, these amendments will be coordinated with the affected MS4 operator on an individual basis.

Comment 280:

Cleburne believes that the language in Part V.B. implies that an MS4 operator cannot make changes to the SWMP despite language in Part V.B.2.(f) that allows for the proposal of changes to the SWMP. It appears this language was more appropriately used in other TPDES permits, but does not meet the intent of this permit. Cleburne comments that the ability to alter the SWMP throughout the permit term is very important to allow the MS4 operator to continually improve its program. Cleburne suggests modifying or deleting the second sentence of this condition to remove the possibility of enforcement against a permit holder or revocation of a permit if the MS4 operator modifies its SWMP.

Response 280:

This provision does not prohibit an MS4 operator from modifying its SWMP during the permit. In fact, as pointed out by the comment, TCEQ encourages regulated MS4 operators to make improvements in their SWMP when improvements are possible. The requirement in the permit is consistent with federal rules at 40 C.F.R. §122.41(f) relating to conditions that are applicable to all permits. The language simply states that, if the MS4 operator notifies TCEQ of a change in the practices at the site, then the MS4 operator must continue to comply with the permit.

Comment 281:

Cleburne comments that MS4 operators cannot halt the rain so, therefore, it cannot halt or reduce the permitted activity. Cleburne recommends deleting Part V.C. because the language in this item was written for industrial point source discharges or pretreatment processes and is not pertinent to storm water discharges.

Response 281:

This requirement in the permit is consistent with federal rules at 40 C.F.R. §122.41(c) relating to conditions that are applicable to all NPDES permits, which states that it "shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit."

Discharger Subject to Penalties for Violations

Comment 282:

Russell Moorman and Carter & Burgess recommend deleting the following references because they were repealed by the legislature: TWC, §§26.136, 26.212, and 26.213.

Response 282:

The references to these sections of the TWC were removed and Part V.E. was revised to include general references to Texas Water Code, Chapters 26, 27, and 28 and Texas Health and Safety Code, Chapter 361. The revised language is more consistent with other TPDES permits.

Authorization for Municipal Construction Activities

Comment 283:

NCTRSW notes that the first paragraph contains a typographical error: "permit general" which should read "general permit."

Response 283:

This item was corrected as noted.

Comment 284:

V&E comments that Part VI. requires that the MS4 operator include storm water MCMs for covered construction activities in the SWMP at the time the SWMP is initially submitted with the NOI in order to obtain coverage. V&E, TCCOS, and Mathews & Freeland request clarification on whether the MS4 operator may only seek municipal construction activity coverage under the MS4 general permit when the operator initially submits the SWMP or if the SWMP may be modified at a later date to obtain coverage for municipal construction activities under the permit.

Response 284:

An MS4 operator may amend its SWMP at any time to include municipally-operated construction activities. Such a change would result in a change to information submitted in the NOI and an NOC would be required to include the construction authorization in the SWMP.

Comment 285:

Group 1 recommends incorporating this section by reference to the CGP, TXR150000, because it almost duplicates the language found in that permit.

Response 285:

Where applicable, the construction provisions of this permit are similar and in many cases, identical to, the CGP. However, the specific provisions were retained in the permit, rather than referencing the CGP language because each general permit is a unique authorization and compliance is determined based on the specific conditions outlined in the permit.

Comment 286:

DFW asks whether storm water discharges from all construction activities conducted on airport property can be authorized under this permit and notes that some construction activities may not be characteristic of municipal construction projects.

Response 286:

Any construction activity in the regulated area where the MS4 operator is the construction site operator may be authorized under this permit. If an airport is the MS4 operator, then airport construction activities may be included under this provision.

Comment 287:

TxDOT requests that small (one to five acres) municipal construction projects that occur during a time and at a location with a rainfall erosivity factor that is less than five be exempt from developing an SWP3, which is allowed under the CGP. Allowing this exemption would maintain consistency between the two permits and provide an incentive for MS4 operators to take advantage of this optional MCM.

Response 287:

Coverage under this seventh MCM is optional and may be on a site-by-site basis. Where construction activities occur and would meet the low-rainfall erosivity waiver conditions of the CGP, MS4 operators may obtain coverage under that permit. There are no application fees for waivers under that separate permit.

Comment 288:

TxDOT requests replacing the term "industrial activity," in Part VI.B.2.(c), with "construction support activity" to remain consistent with the description of this section, "Discharges of Storm Water Associated with Construction Support Activities."

Response 288:

TCEQ agrees that not all construction support activities meet the definition of "industrial" activities, thus the language was revised as requested. In addition, the phrase "as required" was added to the end of the sentence because authorization may be required under the CGP, under the MSGP, or under another TCEQ individual or general permit.

Comment 289:

Houston, Missouri City, and HCFCD request revising the term "air conditioning condensate" in Part VI.B.3.(f) of the permit to "air conditioning condensation."

Response 289:

TCEQ declines to revise the wording, as the term "condensate" is consistent with the TPDES CGP, as well as other TPDES individual and general wastewater permits.

Comment 290:

Harris County requests adding the term "water line flushing" alongside "fire hydrant flushing" in Part VI.B.3.(b). Harris County comments that potable water flushed from lines is often hyperchlorinated, and then the flushed water is discharged to a storm sewer system or other water in the state. Harris County states that acute toxicity in many aquatic animals can occur at concentrations of chlorine of 2.0 mg/l or greater, and requests that the permit restrict fire hydrant and water line flushings to those that are determined to contain less than 4.0 mg/l of chlorine, similar to most small wastewater treatment plants. Carter & Burgess asks how fire hydrant flushing differs from the water line flushing that is allowed at Part II.B.(a) and notes that fire hydrants are supplied by a water line.

Response 290:

TCEQ declines to revise the language, and notes that waterline flushings are included at Part VI.B.3.(e) as a potable water source. The list of non-storm water sources that may be discharged from construction sites permitted under this permit is identical to the sources that may be discharged under the CGP.

Comment 291:

Carter & Burgess asks why the list of acceptable non-storm water discharges in Part V.B.3. includes "vehicle, external building and pavement wash water where detergents and soaps are not used and where spills or leaks of toxic or hazardous materials have not occurred," while the non-storm water discharges allowed in Part II.B. does not. Carter & Burgess asks if that means that the only dischargers that can include this type of non-storm water discharges are those that elect to implement the optional seventh MCM.

Response 291:

The list of non-storm water sources in this section, that may be discharged from construction sites permitted under this permit, is identical to the sources that may be discharged under the CGP from construction activities that are authorized under this section of the general permit. However, as noted in a previous response related to Part II.B. of the permit, the non-storm water list in Part II was revised to add the non-storm water discharges that are listed in the MSGP and the CGP, as well.

Limitations on Permit Coverage

Comment 292:

Mathews & Freeland comment that Part VI.C. states that discharges that occur after construction activities have been completed, and after the construction site and any supporting activity site have undergone final stabilization, are not eligible for coverage under the general permit. Mathews & Freeland states that because the permit authorizes discharges from small MS4s rather than just construction sites, this ex-

clusion effectively denies post-construction discharges from coverage under the general permit. Mathews & Freeland does not believe that is the intent and suggest Part VI.C. be removed from the permit.

Response 292:

In response to this comment, the sentence in Part VI.C. of the general permit was clarified as follows, to note that discharges from municipal construction activities may only obtain permit coverage during actual construction and prior to final stabilization: "Discharges that occur after construction activities have been completed, and after the construction site and any supporting activity site have undergone final stabilization, are not eligible for coverage under Part VI of the general permit."

Numeric Effluent Limitations

Comment 293:

Austin requests adding asphalt batch plants to the requirement to monitor discharges.

Response 293:

Sites that manufacture asphalt emulsions are subject to categorical numeric effluent limitations for storm water discharges based on the Asphalt Emulsion Subcategory of the Paving and Roofing Materials (Tars and Asphalt) Manufacturing Point Source Category at 40 C.F.R. §443.13. Asphalt batch plants typically do not manufacture these materials, but instead purchase asphalt paving and roofing emulsions and then combine them with rock or other materials at the batch plant site. These batch plants qualify for coverage under this permit under certain circumstances that are defined in the permit. There are no numeric effluent limitations in the permit for these sites and there are no categorical effluent limitations established for these discharges. Instead, the permit requires pollution prevention controls to eliminate or reduce pollution in storm water runoff.

Comment 294:

Austin requests increasing the monitoring frequency from once per year to two times per year. Austin also states that, although most construction activities requiring a dedicated batch plant (asphalt or concrete) may be active for a comparatively longer duration than most construction sites, the activities at the site remain temporary in nature relative to fixed facilities.

Response 294:

This seventh MCM would provide authorization for the discharge of storm water from concrete and asphalt batch plants where the MS4 operator meets the definition of a construction site operator and provides an alternative to obtaining coverage under the CGP. For consistency, this permit provides for identical numerical effluent limitations and monitoring frequencies for concrete batch plants as the CGP. There are no effluent limitations in either permit for asphalt batch plants. Concrete batch plants that intend to discharge both storm water runoff and wastewater must obtain coverage under either a TPDES individual permit or the TPDES MSGP, TXR050000. Under the MSGP, the monitoring frequency for these discharges is once per month.

Comment 295:

Cleburne comments that because of the temporary nature of concrete batch plants associated with a construction project, it may not be possible to monitor a discharge from the facility during periods of dry weather. Cleburne requests TCEQ provide some insight on how to exempt storm water monitoring from a plant in use for only a short time during dry weather or when no runoff leaves the property of the batch plant.

Response 295:

The requirement is to sample the discharge of storm water runoff from an associated concrete batch plant at a frequency of once per year. Obviously, if the operation of the plant only occurs during dry weather no sampling is possible. If the plant is in operation for less than one year, then one sample must be collected if a discharge occurs during that time.

Comment 296:

Bunker Hill requests adding a statement to Part VI.D. that says TPDES permits do not contain water quality based effluent limitations and instead are largely based on implementing BMPs and/or technology based limits in combination with instream monitoring to assess standards attainment and to determine whether additional controls on storm water are needed. Bunker Hill believes that this request is consistent with regulatory intent and language and would also result in protection for small MS4s that interconnect with large municipalities.

Response 296:

The Fact Sheet and Executive Director's Preliminary Decision provides the background evidence on water quality compliance for discharges authorized under this permit and is the appropriate place to provide the requested references. More detailed guidance on how TCEQ will rely on BMPs and pollution prevention, as opposed to water quality-based numeric effluent limitations to protect receiving waters is available in TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards*. This document is available on TCEQ's Web page at: *http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/rg/rg-194.html*.

Storm Water Pollution Prevention Plan (SWP3)

Comment 297:

Lubbock asks whether the first paragraph of Part VI.E. should read "storm water associated with construction activities that reach waters in the state."

Response 297:

The purpose of Part V.I. is to provide a permitting mechanism for discharges that would otherwise require permit coverage under the TPDES CGP, TXR150000. The current language that requires an SWP3 to be prepared for discharges that reach waters of the U.S. is consistent with the language in the CGP.

Contents of SWP3

Comment 298:

TxDOT requests clarification of the term "close proximity" in item VI.J.1.(f)(7), in terms of distance.

Response 298:

This language is consistent with the existing TPDES CGP, and refers to water bodies that are either directly adjacent to a construction site or water bodies that will eventually receive the discharge from a construction site. It is appropriate to include waters within three stream miles downstream from the construction site or to list the first classified receiving water that the discharge would reach, whichever is closer. This is consistent with the application requirements for individual TPDES wastewater permit applications.

Comment 299:

TxDOT requests clarification of the term "at or near the site" in item VI.J.1.(h), in terms of distance so that the requirement is more easily understood and complied with.

Response 299:

This item includes water bodies that will actually be located within the construction area, or waters that are adjacent or downstream of the construction site. For the purposes of identifying waters downstream of the construction site, the discharger should include the name(s) of the first classified receiving water downstream of the discharge, or the name(s) of all unclassified receiving water(s) within three stream miles downstream of the site.

Comment 300:

Austin requests removing the term "where feasible" in VI.J.4.(a) from the first sentence of this requirement for sediment basins. Austin suggests stating the basic requirement clearly, followed by a provision for the use of alternative controls if the primary requirement is not feasible.

Response 300:

The permit only requires this structural control "where feasible" because it is appropriate to allow alternative controls when site-specific conditions could make a sediment basin ineffective, inappropriate, or even impossible to implement at a site. The suggested revision to state that the structural control is required and then to provide guidance on alternatives if the control is not feasible does not provide sufficient flexibility to foster easy, site-specific implementation.

Comment 301:

Austin requests that the permit include a requirement in Part VI.J.6. - Other Controls, stating that the SWP3 identify all potential sources of non-storm water discharges (except for flows from fire fighting activities) and ensure that appropriate pollution prevention measures are implemented for the non-storm water components of the discharge. Austin comments that this is consistent with the EPA Region 6 CGP.

Response 301:

This requirement is already included in Part VI.J.10. of the permit. This section requires that "the SWP3 must identify and ensure the implementation of appropriate pollution prevention measures for all eligible non-storm water components of the discharge."

Comment 302:

NCTCOG and Farmers Branch request clarification in Part VI.J.9.(a) regarding whether it is TCEQ's intent to allow for only monthly inspections during seasonal arid conditions or if the exemption is limited only to areas that are finally or temporarily stabilized. NCTCOG and Farmers Branch comment that if the area is not stabilized, monthly inspections during arid seasons are not sufficient to control dirt from entering a storm sewer system without a rain event (direct dumping to the system). During these dry seasons rain is not expected; therefore, sediment controls are more likely neglected, although it is the busiest time for most construction sites.

Response 302:

A once monthly inspection is the minimum frequency required to meet permit compliance in these defined arid or semi-arid areas, regardless of the stage of the construction activity or site stabilization. In these areas of the state, rainfall and the resultant runoff will occur on a much less frequent basis than in other areas. As a result of comparatively less frequent storm events, storm water controls are expected to require maintenance on a less frequent basis than controls utilized in other areas of the state.

Comment 303:

Lubbock asks whether MS4s that are located in areas considered arid annually, rather than seasonally, can utilize the monthly inspection option, included in Part VI.J.9. of the permit. Lubbock states that seasonal and annual seem contradictory, especially for areas that are arid or semi-arid year-round.

Response 303:

An MS4 that is located in an area that has an average annual rainfall of less than 20 inches is considered either an arid or a semi-arid area. It is appropriate to conduct monthly inspections if the entire year is arid, but not if the area experiences a period of time where there is consistent rainfall, or if the construction occurs during a "wet" season.

Comment 304:

Lubbock asks what qualifications are required for personnel to conduct construction inspections and suggests including a definition of those qualifications in Part II of the permit.

Response 304:

There are no certifications or other credentials recognized by TCEQ as necessary for individuals who inspect storm water controls. Inspectors do not need to obtain a letter from TCEQ prior to being allowed to perform inspections. The MS4 operator is in the best position to ensure that the selected personnel have read the SWP3 and are sufficiently familiar with the site to perform these inspections.

Comment 305:

Cleburne recommends moving the statement on noncompliance from Part VI.J.9.(e) because it fits more appropriately under Part VI.J.9.(d). Cleburne suggests adding the following language at the end of J.9.(d): "Where a report does not identify any incidents of non-compliance, the report must contain a certification that the facility or site is in compliance with the SWP3 and this permit." Additionally, Cleburne recommends deleting the last two sentences of J.9.(e) that state: "Reports must identify any incidents of non-compliance. Where a report does not identify any incidents of non-compliance, the report must contain a certification that the facility or site is in compliance with the SWP3 and this permit."

Response 305:

Although VI.J.9.(d) mentions failed structural controls, this is not necessarily equal to permit noncompliance. Therefore, the language in VI.J.9.(e) was not incorporated into VI.J.9.(d). The suggested additional report requirements, including documentation of the names and qualifications of the inspectors, are not necessary to ensure compliance with the SWP3 requirements and were not included.

Additional Retention of Records Requirements

Comment 306:

Cleburne believes that requiring keeping records of construction activities for three years would create a large volume of files and put an undue burden on the MS4 operator. Because of the temporary nature of construction activities, any follow-up on compliance with measures taken as part of the SWP3 should be done during the construction phase or shortly after final stabilization. Cleburne suggests that because the SWP3 remains active until final stabilization it is more reasonable to retain the records six months after the filing of the NOT. This would allow time for TCEQ to review the project after completion or follow up on any complaints prior to records being removed.

Response 306:

The general permit rules in 30 TAC Chapter 205 require that a general permit contain "adequate monitoring, recordkeeping, and reporting appropriate to the type of activity authorized." (30 TAC §205(a)(5)(A)). A three-year record retention requirement is consistent with other TCEQ rules. For example, the requirements for monitoring activities in 30 TAC §319.7(c) state: "All records and information resulting from the

required monitoring activities, including, but not limited to, all records concerning measurements and analyses performed and concerning calibration and maintenance of flow measurement and other instrumentation, shall be retained for a minimum of three years, or for a longer period if requested by the executive director or his designee."

Fact Sheet and Executive Director's Preliminary Decision

Fact Sheet - Allowable Non-Storm Water Discharges

Comment 307:

Grapevine expressed concern over the final paragraph in Part III.E. of the fact sheet. Grapevine states that the requirement could conflict with requirements to maintain safe drinking water standards. Grapevine notes that water line flushing may be necessary to control bacteria levels in the public water supply lines and that restricting necessary flushing operations could result in stagnant water and elevated bacteria levels in the water distribution system.

Response 307:

TCEQ recognizes that water line flushing may be required to control bacteria, but this permit cannot authorize a discharge from the MS4 that would cause a violation of water quality standards. The MS4 operator may need to consider the possible pollutants in any non-storm water discharge that it chooses to allow into the MS4 without additional controls. The language in the fact sheet does not prohibit the discharge of water line flushing; it only states that consideration be given to all discharges that are allowed into the MS4, such as whether those discharges can be allowed without additional BMPs.

Fact Sheet - Discharges from MS4 Construction Activities

Comment 308:

Tarrant County and NCTRSW comment that the last sentence of Part III.F. appears to remove the possibility that the MS4 operator could utilize the general permit to obtain coverage for regulated construction activities while other construction site operators could use the TPDES CGP, TXR150000. The commenters request clarification regarding "sole operator."

Response 308:

TCEQ revised the last sentence of the paragraph to: "Additionally, if the MS4 either cannot or chooses not to meet and maintain the status as the sole operator for any specific construction activity, then authorization under a separate TPDES permit must be obtained for the additional operators, during construction activities at that specific site." A sole operator, for the purposes of this permit, means the only operator at a particular construction site. The sole operator would meet both criteria (a) and (b) that are included in the definition of "construction site operator."

Fact Sheet - Permit Conditions

Comment 309:

Tarrant County and NCTRSW comment that the second sentence of Part IV.C.3., related to the optional seventh MCM, appears inconsistent with the definition of "construction site operator." For consistency with the definition, they request revising the second part of the sentence to replace "and" with "or" so that the sentence reads as follows:

"In order to qualify for this provision, MS4s must maintain control over the plans and specifications of the construction activity, or must maintain the status of the operator with day-to-day operational control over the construction site, to the extent necessary to meet the requirements of the SWP3 for that site."

Response 309:

The requested change was made and a clarification was also added to the fourth sentence to clarify that in some cases the MS4 operator is considered the "sole" operator and thus could obtain coverage for construction activities under this permit without additional requirements for subcontractors to apply for coverage under the CGP.

("Part II") Comments Resulting in Changes in the Republished General Permit - The following comments were received during the original comment period in 2002 and resulted in changes to the re-noticed general permit in 2005. Comments made during the 2005 comment period on the revised language are addressed in Part I of the response to comments. Unless other wise noted, the changes noted were all made in response to comments.

Title Page

Comment 310:

Group 1 requests changing the title of the permit from "General Permit to Discharge Waste" to "General Permit for Discharges from Small Municipal Separate Storm Sewer Systems." Group 1 notes that the current title assumes that storm water meets the state definition of "waste" and their proposed language is taken directly from the EPA model general permit. V&E requests revision of the title page to reflect that this is a general permit to discharge storm water and not waste. V&E comments that the regulation of storm water is derived from CWA, §1342(p), which pertains solely to storm water discharges. V&E comments that the Federal Water Pollution Control Act limits the regulatory oversight to municipal and industrial storm water, which is not a waste. V&E strongly recommends changing the title page of the permit to "General Permit to Discharge Storm Water."

Response 310:

The title of the re-noticed permit was changed to "General Permit to Discharge Under the Texas Pollutant Discharge Elimination System."

Definitions

Comment 311:

Harris County, HCFCD, V&E, and Houston comment that the definition of "best management practices" appears to include only non-structural controls, though structural controls are generally considered BMPs. DAFB, NCTCOG, and Farmers Branch comment that the definition of "best management practices" should read: "practices to prevent or reduce pollution . . .."

Response 311:

The definition of "best management practices" was revised in the re-noticed permit. BMPs are defined as: "Schedules of activities, prohibitions of practices, maintenance procedures, structural controls, local ordinances, and other management practices to prevent or reduce the discharge of pollutants. BMPs also include treatment requirements, operating procedures, and practices to control runoff, spills or leaks, waste disposal, or drainage from raw material storage areas."

Comment 312:

Houston comments that the definition of "control measure" includes a reference to other method used to prevent or reduce the discharge of pollutants and asks if the term "other method" means structural controls.

Response 312:

The definition of "best management practices" was amended in the re-noticed permit to include "structural controls" (see previous response). Therefore, the definition of "control measure" was deleted from the re-noticed permit.

Comment 313:

Houston, V&E, and TDCJ comment that the permit does not define what constitutes a "larger common plan of development or sale" as used in the definitions of large and small construction activities. Houston asks whether TCEQ intends to adopt EPA Region 6 guidance on this term. V&E requests that TCEQ provide written guidance that is readily available to the regulated community if a definition of the term is not included in the permit.

Response 313:

The following definition of "common plan of development" was added to the re-noticed permit: "A construction activity that is completed in separate stages, separate phases, or in combination with other construction activities. A common plan of development or sale is identified by the documentation for the construction project that identifies the scope of the project, and may include plats, blueprints, marketing plans, contracts, building permits, a public notice or hearing, zoning requests, or other similar documentation and activities."

This definition matches the definition found in the CGP number, TXR150000. However, a single definition cannot encompass or describe every possible scenario that may constitute a common plan of development. Therefore, additional guidance and examples may be provided by TCEQ, as necessary.

Comment 314:

NCTCOG and Farmers Branch comment that there is a difference in the definition of "construction site operator" between the TPDES small MS4 general permit and the CGP. Lloyd Gosselink, Carter & Burgess, Houston, Farmers Branch, V&E, Group 1, and Harris County request that the TCEQ replace the word "all" with "either" in the first sentence, and replace "and" with "or" in part (a) of the definition for "Construction Site Operator," for consistency with both TCEQ and EPA Region VI CGPs.

Response 314:

The definition of "construction site operator" was revised for consistency with the approved TPDES CGP, TXR150000. The re-noticed permit defines "construction site operator" as:

The person or persons associated with a small or large construction project that meets either of the following two criteria:

(a) the person or persons that have operational control over construction plans and specifications (including approval of revisions) to the extent necessary to meet the requirements and conditions of this general permit; or

(b) the person or persons that have day-to-day operational control of those activities at a construction site that are necessary to ensure compliance with a storm water pollution prevention plan for the site or other permit conditions (e.g. they are authorized to direct workers at a site to carry out activities required by the Storm Water Pollution Prevention Plan or comply with other permit conditions).

Comment 315:

Cleburne, Farmers Branch, and NCTCOG recommend including a definition of "daily maximum" in the permit. NCTCOG and Farmers Branch comment that this term is used in Part IV. (Numeric Effluent Limitations) and Part VII.D. (Authorization for Municipal Construction Activities) of the permit to describe sampling requirements, but believe the term is subject to interpretation.

Response 315:

The following definition of "daily maximum" was added to the re-noticed permit: "For the purposes of compliance with the numeric effluent limitations contained in this permit, this is the maximum concentration measured on a single day, by grab sample, within a period of one calender year."

Comment 316:

DAFB requests a definition of the term "drainage system." This term is used in the definition of "small municipal separate storm sewer system" and in Part VII.J.9.(b) of the permit.

Response 316:

Part VI.J.9.(b) - Inspection of Controls, was revised in the re-noticed permit to remove the term "drainage system" and add alternative clarifying language.

Comment 317:

DAFB comments that the definition of "final stabilization" should read as follows: "where either of the following two conditions is met . . .." Houston comments that the definition differs from the one used in the CGP and urges TCEQ to use the same definitions in both permits.

Response 317:

TCEQ revised the definition of "final stabilization" in the re-noticed permit to match the definition of the term in the CGP. The first sentence of the definition was changed to: "A construction site where either of the following conditions are met: . . .." Additionally, a new part (b) was added and the original parts renumbered. The new part states:

(b) For individual lots in a residential construction site by either:

(1) the homebuilder completing final stabilization as specified in condition (a) above; or

(2) the homebuilder establishing temporary stabilization for an individual lot prior to the time of transfer of the ownership of the home to the buyer and after informing the homeowner of the need for, and benefits of, final stabilization.

Comment 318:

TCCOS and Mathews & Freeland comment that under the definition of "illicit discharge" the addition of any pollutant to any part of the MS4 would qualify as an illicit discharge. TCCOS and Mathews & Freeland request modifying the definition as follows: "Any discharge to a municipal separate storm sewer system composed of sewage, industrial waste, or municipal waste, except discharges of storm water runoff and discharges resulting from fire fighting activities." TCCOS and Mathews & Freeland also request modification of the definition of "illicit connection" to correspond with the proposed changes for "illicit discharge." Farmers Branch comments that the current definition makes "illicit discharges" out of non-TPDES authorizations, such as those granted under TCEQ's Voluntary Cleanup Program. Cleburne comments that the definition of "illicit discharge" is too broad, and that it would include all discharges from an MS4 because rainwater will always carry some materials (e.g., leaves, sticks, and dirt, sand, silt, fertilizers, etc.). Cleburne also believes the current definition does not take into account agricultural activities that are exempt from permit requirements.

Response 318:

To some extent storm water will usually contain and transport pollutants. Storm water containing pollutants is not automatically classified as an illicit discharge. Only in situations where storm water is commingled with unauthorized waste streams does the discharge become illicit. In the re-noticed permit, TCEQ modified the definition of "illicit discharge" to: "Any discharge to a municipal separate storm sewer that is not entirely composed of storm water, except discharges pursuant to

this general permit or a separate authorization and discharges resulting from emergency fire fighting activities."

Comment 319:

Harris County and HCFCD recommend enclosing in parentheses the phrase "including sewer service connections and foundation drains" in the definition of "infiltration." V&E requests replacing the word "wastewater" with the words "storm water."

Response 319:

The definition of "infiltration" was deleted and the following definition of "ground water infiltration" was added to the re-noticed permit: "Groundwater that enters a sewer system (including sewer service connections and foundation drains) through such means as defective pipes, pipe joints, connections, or manholes."

Comment 320:

Houston and TxDOT request that TCEQ define "large construction activity" the same as it does in the TPDES CGP, TXR150000. DAFB requests revising the language in the definition of "large construction activity" to state: "result in land disturbance of equal to or greater than five (5) acres."

Response 320:

The definition of "large construction activity" was revised in the re-noticed permit to match the definition of that term in the TPDES CGP. The definition was changed to:

"Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than five (5) acres of land. Large construction activity also includes the disturbance of less than five (5) acres of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than five (5) acres of land. Large construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, and original purpose of a ditch, channel, or other similar storm water conveyance. Large construction activity does not include the routine grading of existing dirt roads, asphalt overlays of existing roads, the routine clearing of existing right-of-ways, and similar maintenance activities."

Comment 321:

Group 1 recommends revising the definition of "major outfalls" to state: "An outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent." Cleburne suggests defining a "major outfall" as "an outfall that discharges from a single pipe with an inside diameter of 36 inches or more or an equivalent vegetated drainage that discharges into an intermittent or perennial stream or other water body delineated on the USGS 7.5 minute series topographic map quad sheets." Tarrant County comments that discharges into a floodway as defined by a FEMA map could be used in determining a major outfall instead of using the drainage area. Harris County and V&E request that the definition for "major outfall" include some clarification for the location of the outfall. Tarrant County requests adding the following sentence at the end of the definition: "MS4s that don't have underground storm drain pipe systems and traditional outfalls may substitute other sites that will allow the permittee to locate and trace illicit discharges."

DAFB, TCUC, Harris County, and BCES question how discharges from these pipes are equivalent to discharges from the referenced watersheds. These commenters state that each MS4 should determine what constitutes a "major outfall." Farmers Branch requests revising the criteria for round pipes draining areas zoned as industrial from an inside diameter of 12 inches to a diameter of 24 or 36 inches. V&E, DFW, Cleburne, and Carter & Burgess request clarification for storm water from industrial areas when there are no zoning requirements within the MS4. Carter & Burgess suggests identifying industrial areas by referring to the standard industrial classification codes referenced in the federal regulations and that define "storm water associated with industrial activities."

Harris County and TAOC state that most counties do not have pipes and therefore defining major outfalls based on defined 50-acre drainage areas would require counties to perform prolonged and expensive drainage studies. Tarrant County comments that defining an outfall by the drainage area is unduly restrictive and will require drainage studies. NCTCOG comments that this definition and mapping requirement puts a heavy burden on MS4 operators with limited resources for mapping to produce accurate maps. Group 1 states that the requirement to identify outfalls based on zoning requires development of a comprehensive zoning plan or costly land-use map. Cleburne comments that operators would not have the funding to develop drainage maps on the sub-watershed or micro-watershed level with areas of each watershed measured in acres. Group 1 comments that federal regulations do not require small regulated MS4s to develop costly land-use maps to perform comprehensive zoning or planning efforts or to delineate MS4 "micro-basins" needed to determine the acreage that drains a specific area. Grand Prairie requests requiring a less stringent manner of defining outfalls as MS4s have limited resources for the mapping.

TCCOS and Mathews & Freeland comment that the definition of "major outfall" is from federal regulations for Phase I MS4s and that federal Phase II regulations do not use the term "major outfall" with regard to the level of geographic detail required for mapping of small MS4s. Instead, Phase II regulations require operators to map "outfalls." TCCOS and Mathews & Freeland object to TCEQ forcing Phase II cities to map their MS4s to the same degree of detail as required in the Phase I federal regulations. TCCOS and Mathews & Freeland recommend the use of the term "outfall" rather than "major outfall," without providing a specific definition for the term. NCTCOG suggests defining the term "major outfall" in a less stringent manner or that the mapping requirement in Part III.3.(d)(2) could allow MS4s the option of mapping all outfalls. NCTCOG further comments that the limited resources of small MS4s are likely more suited to identifying all outfalls as opposed to identifying those meeting specific drainage criteria.

Response 321:

The federal rules at 40 C.F.R. §122.34(b)(3)(ii)(A) and adopted by reference in 40 TAC §281.25 require the small MS4 operator to develop a storm sewer system map "showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls." Therefore, the definition of "major outfall" was deleted from the re-noticed permit and Part III.A.3.(d)(1) was revised to require the map of the storm sewer system to show the location of "all outfalls" as required by the federal rules.

Comment 322:

NCTCOG and Farmers Branch recommend defining the term "outfall" in the permit or in a guidance document.

Response 322:

A definition for "outfall" was added to the re-noticed permit and reads as: "A point source at the point where a municipal separate storm sewer discharges to surface water in the state and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances that connect segments of the same stream or other waters of the U.S. and are used to convey waters of the U.S."

Comment 323:

Group 1 recommends changing the definition of "MS4 operator" to remove the words "owner or." Group 1 notes that the term "owner" does not necessarily refer to a public entity and is ambiguous.

Response 323:

The MS4 operator is the party or parties responsible for obtaining permit coverage. In many instances the public entity responsible for the management and operation of the MS4 is the party subject to the permit. In some instances, the public entity may contract with a separate party to provide management and maintenance of the system and for implementation of the SWMP. In these instances and depending on the terms of the contract, both the contractor and the public entity may be required to apply for coverage. Therefore, the definition of "MS4 Operator" in the re-noticed permit now states: "The public entity, and/ or the entity contracted by the public entity, responsible for management and operation of the municipal separate storm sewer system that is subject to the terms of this general permit."

Comment 324:

NCTCOG recommends defining the term "notice of change" in the permit or in a guidance document.

Response 324:

A definition of "notice of change" was added to the re-noticed permit. It is defined as: "Written notification from the permittee to the executive director providing changes to information that was previously provided to the agency in a notice of intent."

Comment 325:

NCTCOG and Farmers Branch request defining the term "notice of termination" in the permit or in a guidance document.

Response 325:

A definition of "notice of termination" was added to the re-noticed permit. It is defined as: "A written submission to the executive director from a permittee authorized under a general permit requesting termination of coverage under this general permit."

Comment 326:

Houston requests that TCEQ use the same definition of "small construction activity" that it uses in the CGP. TxDOT requests that this definition be consistent with the definition found in the CGP.

Response 326:

The definition of "small construction activity" was revised in the re-noticed permit to match the definition in the TPDES CGP, TXR150000. The definition was changed to:

"Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one (1) acre and less than five (5) acres of land. Small construction activity also includes the disturbance of less than one (1) acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one (1) and less than five (5) acres of land. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, and original purpose of a ditch, channel, or other similar storm water conveyance. Small construction activity does not include the routine grading of existing dirt roads, asphalt overlays of existing roads, the routine clearing of existing right-of-ways, and similar maintenance activities."

Comment 327:

V&E, DAFB, TCCOS, and Mathews & Freeland request clarification and/or written guidance for the last subpart in the definition of "small municipal separate storm sewer system," which states that it does not include "very discrete systems such as those serving individual buildings." TCCOS and Mathews & Freeland recommend modifying that portion of the definition to exempt those MS4 operators whose systems serve less than one acre. TCCOS and Mathews & Freeland also ask whether independent school districts and community colleges, or the Capital Area Complex are required to obtain coverage.

Response 327:

The definition was not modified to delineate a fixed number of acres that would constitute a system because it would not take into account the purpose of the storm water conveyances within an area. In the preamble to the Phase II rules (See 64 FR 68749), EPA discusses instances where a municipal separate storm sewer may not be considered a system. For example, a storm sewer serving only one building would not be considered a system and EPA includes the specific examples of post offices or urban offices of the U.S. Park Service. EPA also indicated that storm sewers for federal facilities consisting of more than one building may be treated as a single building rather than as an MS4 and states that the permitting authority must determine whether a municipal complex is regulated as a small MS4. Such determinations may necessarily remain subjective and are not easily defined. Therefore, though TCEQ may develop guidance it still may be required to make individual determinations on what constitutes an MS4.

However, the following was added to the definition of small MS4 in the re-noticed permit to help clarify when a system requires permit coverage: "For purposes of this permit, a very discreet system includes storm drains associated with municipal office and education complexes, where the complexes serve a transient (nonresidential) population, and where the buildings are not physically interconnected to an MS4 that is also operated by that public entity."

Comment 328:

V&E requests that the permit include a definition for "structural control" identical to the definition in the storm water CGP. Harris County requests defining "structural controls" as follows: "constructed facilities or vegetative practices that are generally designed to minimize, capture or prevent pollution."

Response 328:

A definition of "structural control" was added to the re-noticed permit. The definition is identical to the definition in the TPDES CGP, TXR150000:

"A pollution prevention practice that requires the construction of a device, or the use of a device, to capture or prevent pollution in storm water runoff. Structural controls and practices may include but are not limited to: wet ponds, bioretention, infiltration basins, storm water wetlands, silt fences, earthen dikes, drainage swales, sediment traps, check dams, subsurface drains, storm drain inlet protection, rock outlet protection, reinforced soil retaining systems, gabions, and temporary or permanent sediment basins."

Comment 329:

TCCOS and Mathews & Freeland request modifying the definition of "storm water management program" as follows to reflect the true scope of the permit requirements: "a comprehensive program to manage the quality of discharges from the municipal separate storm sewer system."

Response 329:

The definition of SWMP was revised in the re-noticed permit to state: "Storm Water Management Program (SWMP) - A comprehensive program to manage the quality of discharges from the municipal separate storm sewer system."

Comment 330:

TCUC and BCES note that the definition of "urbanized area" is defined by the 1990 and 2000 Decennial Census and inquire which census TCEQ intends to use. Group 1, V&E, TAOC, TCCOS, Freese & Nichols, Mathews & Freeland, and Dodson request revision of the definition of "urbanized area" and revision of Part II.A.1. to reflect that urbanized areas are based on only the 2000 Decennial Census. NCTCOG and Farmers Branch request revising the definition of "urbanized area" as follows: "An area of high population density as defined and used by the U.S. Census Bureau in the 1990 and 2000 decennial census that may include multiple MS4s."

Response 330:

The federal Phase II storm water rules at 40 C.F.R. §122.32(a)(1) base the need for a permit on the "latest decennial Census." Subsequent EPA guidance indicates that the urbanized area boundaries are based solely on the 2000 Census Data. The definition of "urbanized area" in the re-noticed permit was modified to state: "An area of high population density that may include multiple MS4s as defined and used by the U.S. Census Bureau in the 2000 Decennial Census."

In addition, Part II.A.1.was revised in the re-noticed permit to: "A small MS4 that is fully or partially located within an urbanized area, as determined by the 2000 Decennial Census by the U.S. Bureau of Census, must obtain authorization for the discharge of storm water runoff and is eligible for coverage under this general permit."

Comment 331:

Houston and V&E comment that the definition of "waters of the United States" does not parallel the EPA's definition at 40 C.F.R. §122.2. Specifically, the exclusions for water treatment systems and prior converted crop lands were omitted from the federal definition in the permit. V&E recommends revising the definition in the TPDES general permit to incorporate these exclusions in the definition of "Waters of the United States."

Response 331:

The definition of "waters in the United States" in the re-noticed permit was amended to add the following language from the federal definition:

"Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR §423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA."

Designated MS4s and Designation Criteria

Comment 332:

TCCOS, Mathews & Freeland, Lloyd Gosselink, and Carter & Burgess comment that the designation criteria attempts to establish a requirement of general applicability and that adoption through rulemaking procedures pursuant to Texas Government Code, Chapter 2001, is appropriate. TCCOS, Lloyd Gosselink, Carter & Burgess, and Mathews & Freeland also request offering designated small MS4s the opportunity for a contested case hearing if they wish to challenge TCEQ's determination. Tarrant County suggests adding the following language after the second sentence in the opening paragraph of Part II.A.2.: "The designation process is subject to TCEQ appeal procedures." TCCOS and Mathews & Freeland further comment that TCEQ did not make any attempt to apply the designation criteria to any small MS4s prior to December 9, 2002. HCFCD comments that neither the Fact Sheet nor permit indicate whether the application of the criteria has resulted in the designation of any additional small MS4s. NCTCOG and Farmers Branch comment that TCEQ is applying the designation criteria to all entities and does not limit these criteria to EPA's suggestion of entities with a population of at least 10,000 and 1,000 persons per square mile and does not give consideration to high growth potential or contiguity to an urbanized area. NCTCOG and Farmers Branch also comment that the words "with consideration" in the opening paragraph of Part II.G. are unclear and therefore do not allow a simple mechanism to determine if a community may be designated. In addition to the designation criteria in the permit, Austin requests that TCEQ add a factor related to the control of discharges for the protection of sole-source drinking water supplies and a second factor related to the control of discharges for the protection of endangered species. DAFB requests changing the permit language to use the term "contiguous" instead of "adjacent" because the term "adjacent" does not necessarily indicate that the systems touch each other and does not mean that one system discharges to the other. If TCEQ declines to make the requested change, DAFB requests including a definition of the term "adjacent small MS4" in the permit. V&E, TAOS, TCUC, BCES, and Cleburne request the deletion of the sixth criterion used for designation of MS4 operators as covered under this permit because it is vague and too subjective. V&E asks how this criterion could be implemented on a consistent and objective basis. TCUC and BCES comment that the language allows TCEQ too much authority to designate non-urbanized areas.

Response 332:

40 C.F.R. §122.32(a)(2), which was adopted by reference in 30 TAC §281.25, states that a small MS4 may be regulated if "[y]ou are designated by the TPDES permitting authority . . .." To meet the requirement in §122.32(a)(2), TCEQ developed designation criteria to apply to small MS4s that are not located in urbanized areas and where it was determined that controls were necessary to protect water quality. TCEQ applied the criteria to small MS4s located outside of urbanized areas and determined that no additional small MS4s were "designated" at this time. The criteria used for making a determination whether TCEQ would designate any additional MS4s were: 1) whether controls for discharges were determined to be necessary for source water protection of public drinking water resources based on the results of source water assessments by TCEQ; 2) whether controls for discharges were necessary to protect sea grass areas of Texas bays as delineated by the Texas Parks & Wildlife Department; 3) whether controls for discharges were necessary to protect receiving waters designated as having an exceptional aquatic life use; 4) whether controls are required for pollutants of concern expected to be present in discharges to a receiving water listed on the CWA, §303(d) list based on an approved TMDL plan; 5) if requested by a regulated MS4 operator, that discharges from an adjacent small MS4 were determined by TCEQ to be significant contributors of pollutants to the regulated MS4; and 6) additional factors relative to the environmental sensitivity of receiving watersheds.

EPA did not specify what criteria must be used or that the criteria be included in the permit. EPA specified only that criteria be developed "to evaluate whether a storm water discharge results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts." See 40 C.F.R. §123.35(b)(1)(i).

Therefore, TCEQ has decided not to include specific designation criteria in the permit language. TCEQ may identify other criteria with

sufficient water quality impacts to warrant "designation" in the future; it is not doing so at this time. Part II.G. was deleted from the re-noticed permit and Part II.A.2. was revised to state:

2. Designated MS4s

An MS4 that is outside an urbanized area that has been "designated" by TCEQ based on evaluation criteria as required by 40 CFR §122.32(a)(2) or 40 CFR §122.26(a)(1)(v) and adopted by reference in Title 30, Texas Administrative Code (TAC), §281.25, is eligible for coverage under this general permit. Following designation, operators of small MS4s must obtain authorization under this general permit or apply for coverage under an individual TPDES storm water permit within 180 days of notification of their designation.

Allowable Non-Storm Water Discharges

Comment 333:

DAFB requests a definition for "substantial sources of pollutants" and requests clarification on how these sources are determined and documented. Houston comments that the permit lists non-storm water discharges that are allowed provided the MS4 operator has not determined that they are "substantial" sources of pollutants. However, the Phase II rules allow these discharges as long as they are not "significant" sources of pollutants. Houston asks whether TCEQ intends a different meaning. CTS requests revising the last phrase of the introductory paragraph, "provided that they have not been determined by the permittee to be substantial sources of pollutants to the MS4," to "unless they have been determined by the permittee to be substantial sources of pollutants."

Response 333:

The MS4 operator can determine if certain non-storm water discharges to their system are a significant contributor of pollutants to their system by implementing their illicit discharge detection and elimination MCM. 40 C.F.R. §122.34(b)(3)(iv) recommends visually screening outfalls during dry weather and conducting field tests of selected pollutants as part of the procedures for locating priority areas. The MS4 operator may determine that the source is a significant contributor based on a number of factors, including: Observing the immediate receiving waters for signs of changes in the appearance or biological communities; sampling the source and submitting the sample to laboratory analyses; and considering the nature of the source and local water quality.

To maintain consistency with the federal rules at 40 C.F.R. §122.34(b)(3)(iii) and to Part III.A.3.(c) of this permit, the introductory paragraph of Part II.B was changed in the re-noticed permit to: "The following non-storm water sources may be discharged from the small MS4 and are not required to be addressed in the MS4's Illicit Discharge and Detection or other minimum control measures, unless they have been determined by the permittee or the TCEQ to be significant contributors of pollutants to the MS4: . . .."

Comment 334:

DFW, Farmers Branch, and Grand Prairie request a definition of what is included in "fire fighting activities" as used in Part II.B.(o) and request that the permit include a listing of the activities that are exempted. The commenters indicate that some of the activities that may be confusing include the washing of trucks at fire stations, runoff water from training exercises, and test water from fire suppression systems.

Response 334:

Discharges from fire fighting activities are those discharges that result following the emergency response to a fire and the activities required to extinguish that fire. Fire fighting activities would not include the washing of trucks at fire stations, runoff water from training exercises, and test water from fire suppression systems. Part II.B.(o) was modified in the re-noticed permit to: "discharges or flows from fire fighting activities (fire fighting activities do not include washing of trucks, run-off water from training activities, test water from fire suppression systems, and similar activities); . . .."

Discharges Authorized By Another TPDES Permit

Comment 335:

DAFB suggests that the construction of the first sentence due to the placement of the word "only" indicates that authorization is the single consequence possible and implies that there are additional, but unspecified consequences other than authorization. DAFB recommends revising the permit language to: ". . . may be authorized under this TPDES general permit only if the following . . .."

Response 335:

In response to the comment, Part II.C.1. of permit was revised to: "Discharges authorized by an individual or other general TPDES permit may be authorized under this TPDES general permit only if the following conditions are met: . . .."

Compliance With Water Quality Standards

Comment 336:

GCHD asks who will make the determination that the discharge will affect water quality. Group 1 comments that this language would require small regulated MS4s to determine if storm water discharges would cause or contribute to a violation of water quality standards or that the discharge would fail to protect and maintain the existing designated uses of the receiving stream in order to be eligible for coverage under this permit. They suggest revising the language to say that the discharges are not eligible for coverage under the permit if those discharges are determined by TCEQ to cause or contribute to a violation of water quality standards. In the event a discharge is not eligible under this provision, TCEQ should provide some level of general permit coverage until such time an individual permit is issued.

Response 336:

It is the responsibility of TCEQ to determine that the discharge would result in a violation of water quality standards and to notify the applicant. The second sentence of Part II.C.3. was modified in the re-noticed permit to: "The executive director may require an application for an individual permit or alternative general permit to authorize discharges to surface water in the state if the executive director determines that an activity will cause a violation of water quality standards or is found to cause or contribute to the impairment of a designated use of surface water in the state."

Discharges to the Edwards Aquifer Recharge Zone

Comment 337:

Lloyd Gosselink and Carter & Burgess request deleting the following sentence from the second paragraph: "All applicable requirements of the Edwards Aquifer Rule for reductions of suspended solids in storm water runoff are in addition to the effluent limitation requirements and benchmark goals in this general permit for this pollutant." The commenters state that the only effluent limits in the permit are for storm water runoff from concrete batch plants and that there are no benchmark goals set in permit.

Response 337:

The third sentence of the second paragraph of Part II.C.5. was revised in the re-noticed permit to: "All applicable requirements of the Edwards Aquifer Rule for reductions of suspended solids in storm water

runoff are in addition to the effluent limitation requirement found in Part VI.D. of this general permit."

Comment 338:

TxDOT disagrees with the requirement in Part II.C.5. to attach the Water Pollution Abatement Plan to the SWMP. TxDOT also requests revising the permit throughout so that the current requirements that certain items "must be included in the SWMP," instead state that the items must be "included or referenced in the SWMP." TxDOT believes this would allow the maintenance of supplementary or additional detailed information in separate documents, thus keeping the SWMP at a more manageable size.

Response 338:

The fourth sentence of the second paragraph of Part II.C.5. was revised in the re-noticed permit to: "A copy of the agency-approved Water Pollution Abatement Plans that are required by the Edwards Aquifer Rule must either be attached as a part of the SWMP or referenced in the SWMP."

Application for Coverage

Comment 339:

Farmers Branch, Cleburne, Harris County, Missouri City, TAOC, and V&E request that the permit define a deadline or time frame for the executive director to acknowledge and respond to an application for coverage under this general permit. The commenters suggest considering the NOI and SWMP administratively complete if TCEQ fails to respond within a specific time frame. V&E recommends a 45-day time frame. Farmers Branch and Cleburne recommend a time frame of 90 days. Harris County, Missouri City, and TAOC recommend a time frame of 60 days. TCCOS, Mathews & Freeland, and Grapevine recommend using the following language in the general permit: "Within 30 days of the submittal of the NOI, the Executive Director shall determine either: *(1) the NOI is complete and confirm coverage by providing a notification and an authorization number; (2) the NOI is incomplete and deny coverage until a completed NOI is submitted, or (3) the applicant is ineligible for coverage and require an application for an individual permit be submitted. If TCEQ has not responded to a submittal of an NOI within 30 days, the NOI is presumed complete and the applicant is eligible for coverage under the permit."*

Response 339:

Based on the partial remand of the Phase II rules by the U.S. 9th Circuit Court of Appeals on September 15, 2003, that permitting authority review is required for the NOI, the provision automatically authorizing coverage was removed from the re-noticed permit and the section was revised to state that authorization does not occur until "the applicant is notified by TCEQ that the NOI and SWMP have been administratively and technically reviewed and the applicant has followed the public participation provisions in Part II.D.12."

Comment 340:

NCTCOG, Farmers Branch, TCUC, and BCES comment that Part II.D.1.(a) does not address what the deadline is for submitting an NOI if the permit effective date occurs after December 9, 2002. NCTCOG, Farmers Branch, Cleburne, Harris County, and TAOC request clarification of whether the 90-day time frame for submitting an NOI would apply if the permit's effective date is later than December 9, 2002, and/or if the EPA deadline of March 10, 2003, for issuing the permit is not met.

Response 340:

The March 10, 2003, deadline is specifically stated in the federal rules for storm water discharges at 40 C.F.R. §122.26(e)(9) adopted by reference by TCEQ at 30 TAC §281.25. To change the date would require an amendment of the federal rules. However, the permit provisions allow MS4 operators 90 days following the effective date of the permit to submit an NOI for coverage under the permit. The 90-day application time frame would begin the date the permit is issued and is not based on the March 10, 2003, federal deadline. The time frame is established to provide a reasonable period for regulated MS4s to revise and finalize SWMPs for submitting with their NOI.

Although the issuing of this permit and the deadline for application are beyond the federal deadline, authorization of the discharges is most reasonably regulated under a general permit. TCEQ does not intend to initiate enforcement actions against regulated MS4s that meet the application deadline in the permit. Until the application is submitted and until authorization is obtained, TCEQ recommends that MS4s implement those BMPs and other pollution prevention measures that they have developed in order to ensure that storm water discharges do not threaten receiving water quality. In the re-noticed permit the second sentence of Part II.D.1.(a) was deleted because the dates referenced are no longer applicable.

Comment 341:

TCCOS and Mathews & Freeland comment that the permit should include specific language consistent with 30 TAC §205.4(c) explaining how the executive director will notify operators of small MS4s if they are denied coverage under the permit. TCCOS and Mathews & Freeland also ask that the permit specify a time frame for the submission of an individual permit application if coverage under the general permit is denied. If coverage is denied they request allowing the operator of a small MS4 to discharge pursuant to the terms of the general permit until the commission issues a final decision on an individual permit application. TCCOS and Mathews & Freeland request using the following language in the general permit: "If the Executive Director denies coverage under this general permit, the Executive Director shall provide written notice to the discharger including, at a minimum, a statement of the basis for the denial of coverage and a statement that the discharger has 180 days to submit an individual permit application. An operator of a small MS4 that is denied coverage under this permit shall be authorized to discharge pursuant to this general permit until the effective date of the commission's action on an individual permit application."

Response 341:

Denial of coverage under a general permit is controlled by 30 TAC §205.4(c) relating to denial of an authorization or NOI. Denial of coverage under the permit would not necessarily require an individual permit application. The rule also specifically states that in the event a discharger is denied coverage under a general permit that the executive director will notify the discharger in writing (30 TAC §205.4(c)(1)). In the re-noticed permit Part II.D.1. was changed to add the following sentence: "Denial of coverage under this general permit is subject to the requirements of 30 TAC §205.4(c)."

Comment 342:

TCCOS and Mathews & Freeland comment that the permit does not include requirements found in 30 TAC Chapter 205 requiring general permits to describe the procedure for suspension of authorization. TCCOS and Mathews & Freeland request the use of the following language to describe the suspension procedure: "The executive director may suspend a discharger's authority to discharge under this permit for the reasons specified in §205.4(d) of this title (relating to Authorizations and Notices of Intent) by providing the discharger with written notice of the executive director's intent to suspend authority. The written notice shall include a statement of the basis for this decision, a statement that the discharger's authorization under this general permit shall be suspended on the effective date of the commission's action

on an individual permit application (unless the commission provides otherwise), a statement that an individual permit application must be submitted within 180 days of the notice, and a statement that the executive director's decision is subject to being overturned pursuant to §50.139 of this title (relating to Motion to Overturn Executive Director's Decision.)."

Response 342:

30 TAC §205.4(d)(1) requires the permit to describe the procedures for suspension of an authorization or NOI. Therefore, the re-noticed permit was revised to include a new Part II.D.11. - Suspension of Permit Coverage, that states:

"The executive director may suspend an authorization under this general permit for the reasons specified in 30 TAC §205.4(d) by providing the discharger with written notice of the decision to suspend that authority, and the written notice will include a brief statement of the basis for the decision. If the decision requires an application for an individual permit or an alternative general permit, the written notice will also include a statement establishing the deadline for submitting an application. The written notice will state that the authorization under this general permit is either suspended on the effective date of the commission's action on the permit application, unless the commission expressly provides otherwise, or immediately, if required by the executive director."

Storm Water Management Program (SWMP)

Comment 343:

TCCOS and Mathews & Freeland comment that the permit states that to obtain authorization an MS4 operator must submit an NOI with an SWMP. Part II.D.3. refers to this submission as an "initial" SWMP and the Fact Sheet states that the NOI will include a "description of the required" SWMP. TCCOS and Mathews & Freeland note the inconsistency in these provisions and seek clarification. Additionally, TCCOS comments that the permit provisions do not adequately describe what must be included in an initial SWMP. TCCOS and Mathews & Freeland request revising the language in Part II.D.3. as follows: "An initial storm water management program must be developed for eligible discharges that reach Waters of the United States according to the requirements of Part III of this permit and a description of the initial SWMP must be submitted with the NOI. The initial SWMP should include a plan for the development of BMPs and the measurable goals for each of the storm water MCMs in Part III of this permit and must include a time line that demonstrates a schedule for the development and implementation of the program throughout the permit term. The program must be completely implemented by the expiration date of this general permit. If an MS4 operator determines changes to the plan are needed, alterations can be made so long as the revisions are summarized in the annual report."

Response 343:

An applicant for coverage under the permit must submit an SWMP that describes the six MCMs and the seventh MCM if the MS4 operator is also seeking to use that optional provision. Many MCMs may not be fully developed and the applicant may need to provide a development and implementation schedule. Such an SWMP would satisfy the application requirements. The specifics of the SWMP may be modified throughout the term of the permit as the MS4 operator modifies the MCMs to improve or more efficiently control pollution.

For consistency throughout the re-noticed permit, all references to an "initial SWMP" in the permit were changed to "the SWMP" to avoid any perception that there are two separate documents, a "SWMP" and an "initial SWMP." Also, the Fact Sheet was changed to state that an SWMP must be submitted with the NOI.

Comment 344:

Missouri City recommends revising the first sentence to clarify that an SWMP must be developed for MS4s in urbanized areas with discharges to interconnected MS4 systems that subsequently drain to waters of the U.S. Missouri City believes that the language as written may be construed to mean that systems with no direct discharges to waters of the U.S. do not need to develop an SWMP.

Response 344:

The first sentence in Part II.D.3. was revised in the re-noticed permit to: "A SWMP must be developed and submitted with the NOI for eligible discharges that will reach waters of the United States (U.S.), including discharges from the regulated small MS4 to other MS4s or privately-owned separate storm sewer systems that subsequently drain to waters of the U.S. according to the requirements of Part III of this general permit and submitted with the NOI."

Contents of the NOI

Comment 345:

Houston comments that almost everywhere in the permit the regulated party is referred to as the MS4 operator, which includes both the owner and operator of the MS4. However, for purposes of the content of the NOI, only information on the owner is required. Houston comments that TCEQ should require the same information from both the owner and operator if the entity that operates the MS4 is different from the owner of the MS4.

Response 345:

Part II.D.4. of the re-noticed permit, Contents of the NOI, and Part II.D.5., Notice of Change (NOC) were revised to delete references to the "owner" and instead require information regarding the "MS4 operator," defined in the permit as "the owner or public entity that is responsible for the management and operation of the municipal separate storm sewer system and is subject to the provisions of this general permit." Part II.D.4.(a) was revised to change the heading from "Owner Information" to "MS4 Operator Information." Additionally, the first sentence of Part II.D.5. was changed to the following: "If the MS4 operator becomes aware that it failed to submit any relevant facts, or submitted incorrect information in the NOI, the correct information must be provided to the executive director in an NOC within 30 days after discovery."

Comment 346:

DFW asks if the word "any" in Part II.D.4.(b)(5) to provide "the name, mailing address, telephone number, and fax number of any person(s) responsible for implementing or coordinating the SWMP" refers to all persons responsible for implementing the SWMP or implies one designee. Tarrant County, NCTCOG, Farmers Branch, TCUC, Harris County, Missouri City, and TAOC recommend revising the requirement to include the name of a "designated" person for clarification and to make the requirement practical to implement. Tarrant County believes the SWMP, a more comprehensive document than the NOI, would contain information about "any person(s)."

Response 346:

Part II.D.4.(b)(5) was revised in the re-noticed permit to: "the name, mailing address, telephone number, and fax number of the designated person(s) responsible for implementing or coordinating implementation of the SWMP . . .."

Comment 347:

TCCOS and Mathews & Freeland comment that Part II.D.4.(b)(6) appears to require applicants to submit the name of the SWMP or the

name of the building where the SWMP is located. TCCOS and Mathews & Freeland recommend changing this provision to clearly require the name, description, or the physical location of the SWMP.

Response 347:

Part II.D.4.(b)(6) was revised in the re-noticed permit to: "either the physical address or a description of the location of the SWMP . . .."

Comment 348:

Lloyd Gosselink, Cleburne, and Carter & Burgess comment that the purpose is not apparent for the requirement in Part II.D.4.(b)(7) to include on the NOI the name and address where the public can view all applicable records and that the term "all applicable records" is ambiguous. Cleburne comments that if a location must be provided for the general public to view records on demand, then the available records should be restricted to the NOI, original SWMP, and annual reports. The commenters state that the availability of these documents should be determined pursuant to the Texas Public Information Act. Lloyd Gosselink and Carter & Burgess comment that it is not necessary to identify in the NOI where the documents are available.

Response 348:

Part II.D.4.(b)(7) was deleted from the re-noticed permit. The previous provision requires that the NOI include information on the location of the SWMP. Part IV.A.3. specifies what records must be made available upon written request by the public and was modified to specify that records other than the NOI and SWMP requested from an MS4 operator are subject to the requirements of the Texas Public Information Act. The revised section states that the NOI and SWMP must be made available to the general public if requested in writing and that other records may be made available in accordance with the Texas Public Information Act.

Comment 349:

TCCOS and Mathews & Freeland comment that requiring certification that the SWMP was developed according to the provisions of the permit at the time of filing an NOI is premature given that only an initial SWMP will be submitted with the NOI. TCCOS and Mathews & Freeland request modifying the permit to reference the "initial SWMP."

Response 349:

As noted in an earlier response, all references to an "initial SWMP" were changed to "the SWMP" in the re-noticed permit to avoid any perception that there are two separate documents, an "SWMP" and an "initial SWMP." This section requires the applicant to certify that the original SWMP submitted to TCEQ is a document that was prepared according to the provisions and requirements of the permit.

Comment 350:

TxDOT, DAFB, NCTCOG, Cleburne, Farmers Branch, Freese & Nichols, DFW, Carter & Burgess, Grand Prairie, TCCOS, Mathews & Freeland, Grapevine, TCUC, Tarrant County, Harris County, and TAOC recommend defining the term "major waters" in Part II.D.4.(9) and (10) because the requirement to identify all receiving waters is overly burdensome. TCCOS and Mathews & Freeland recommend deleting either the word "major" or that a more descriptive criteria be used. NCTCOG, Farmers Branch, and Freese & Nichols request deleting "the" and the term "waters of the United States" substituted. Lloyd Gosselink and Carter & Burgess recommend deleting the term and replacing it with the term "classified segments" because that term is defined in 30 TAC §307.3(a)(11). Group 1 requests deleting the term and instead using the term "receiving waters."

Response 350:

Part II.D.4.(9) and (10) were deleted and the following Part II.D.4.(8) was added in the re-noticed permit:

(8) the name of each classified segment that receives discharges, directly or indirectly, from the MS4. *If one or more of the discharge(s) is not directly to a classified segment, then the name of the first classified segment that those discharges reach shall be identified . . ..*

Comment 351:

TxDOT states that they currently review projects based on the most current EPA approved CWA, §303(d) list, which was published in 1999. TxDOT suggests changing the language in Part II.D.4.b.(10) from "are on the latest CWA §303(d) list" to "are on the latest EPA approved CWA §303(d) list" to avoid confusion regarding what list is applicable.

Response 351:

The phrase "approved CWA §303(d) list" was added to Part II.D.4.b.(10) in the re-noticed permit.

Notice of Change (NOC)

Comment 352:

NCTCOG, Farmers Branch, TCUC, and DAFB request that the permit be more specific about the changes that would require an NOC. TAOC and Cleburne request defining what changes require an NOC. Farmers Branch suggests removing the term "relevant" because it is unclear. TAOC requests development of an NOC form.

Response 352:

Currently NOCs are provided by MS4 operators to the executive director in the form of a letter. The development of NOC forms is currently being considered for a number of existing TPDES general permits and will also be considered for this permit. The second sentence of Part II.D.5 was revised in the re-noticed permit to: "If any information provided in the NOI changes, an NOC must be submitted within 30 days from the time the permittee becomes aware of the change."

Notice of Termination (NOT)

Comment 353:

DAFB comments this section refers to NOTs while the language regarding NOTs follows this section and requests reversing in order these sections of the permit.

Response 353:

TCEQ declines to change the order of the sections, but in the re-noticed permit the title of Part II.D.7. was changed from "Terminating Coverage to "Notice of Termination (NOT)."

Signatory Requirement for NOI, NOT, and NOC Forms

Comment 354:

Tarrant County suggests including the actual "I certify . . ." language found in 30 TAC §305.44 because this program may involve local government staff who are not familiar with the legal details regarding the signatory requirement. Tarrant County states that this could simplify the preparation of these documents and also stresses the importance of complying with SWMP provisions. Cleburne asks if this section should also include a reference to certification requirements, such as the certification statement in 30 TAC §305.44(b) and whether the certification statement should be signed as required by that rule.

Response 354:

The signatory portion of the NOI and NOT forms will include the certification statement. Due to the varied types of operators of small MS4 systems, it is necessary for applicants to review 30 TAC §305.44

to identify what level of authority is required to sign the appropriate forms. However, Part II.D.8. was revised in the re-noticed permit to more clearly reference the applicable TAC requirement: "NOI, NOT, and NOC forms must be signed and certified consistent with 30 TAC §305.44(a) and (b) (relating to Signatories to Applications)."

Fees

Comment 355:

V&E comments that MS4s "are separate and distinct from sanitary sewer systems and do not involve the introduction of waste waters to waste treatment facilities." V&E further comments that storm water and specified non-storm water discharges authorized under the permit are not wastewater and that it is inappropriate to make these discharges subject to a "wastewater service fee." V&E and Houston recommend the removal of this waste treatment inspection fee from this permit. Cleburne requests limiting fees to the $100 application fee and the $100 annual inspection fee, and not include watershed monitoring and assessment fees.

Response 355:

The Waste Treatment Inspection Fee and the Water Quality Assessment Fee were combined into a single Water Quality Fee under 30 TAC Chapter 21. There is no longer an annual watershed monitoring and assessment fee. The application fee is based on the cost to the agency for processing the application and tracking the information in an electronic database. The annual water quality fee is utilized to help fund the agency's inspection programs that ensure compliance with the TPDES permitting program. However, the second paragraph of Part II.D.9 regarding waste treatment inspection fees was revised in the re-noticed permit to: "A permittee authorized under this general permit must pay an annual Water Quality fee of $100 under Texas Water Code, §26.0291 and 30 TAC Chapter 205 (relating to General Permits for Waste Discharges)."

Permit Expiration

Comment 356:

Harris County and Cleburne note that if the general permit is not renewed, MS4s must submit an individual permit application at least 180 days before the expiration date. Harris County requests adding the following language: "TCEQ must notify the permittee of its intent to not renew this permit at least 240 days before the expiration of this permit." Cleburne suggests requiring TCEQ notify MS4 operators in writing one year in advance of permit expiration if the permit will not be renewed. DFW asks what permitted MS4s would need to do if the decision is made that the general permit will not be renewed, but it is not announced at least 180 days prior to the expiration date.

Response 356:

30 TAC §205.5(d) requires that, if the commission is not proposing to renew a general permit at least 90 days before its expiration date, dischargers authorized under the general permit must submit an application for an individual permit before expiration of the general permit. It further states that if an application for an individual permit is submitted before expiration of the general permit, authorization under the expired general permit remains in effect until the individual permit application is issued or denied.

Therefore, Part II.D.10.(d) was revised in the re-noticed permit to: "If the commission does not propose to reissue this general permit within 90 days before the expiration date, permittees must apply for authorization under a TPDES individual permit or an alternative general permit. If the application for an individual permit is submitted before the expiration date, authorization under this expiring general permit remains in effect until the issuance or denial of an individual permit."

Permitting Options

Comment 357:

CTS requests changing the phrase in the second sentence of Part II.E.1. from "regardless if the systems are physically interconnected . . ." to "regardless whether the systems are physically interconnected . . .."

Response 357:

The second sentence of Part II.E.1. was modified in the re-noticed permit to: "Multiple small MS4s with separate operators must individually submit an NOI to obtain coverage under this general permit, regardless of whether the systems are physically interconnected, located in the same urbanized area, or are located in the same watershed."

Comment 358:

Missouri City requests revising the fourth sentence in Part II.E.1. to: "These MS4 operators may combine or share efforts in meeting any or all of the SWMP requirements stated in Part II.D.3. or Part III of this general permit." Missouri City also requests adding a new sentence prior to the final sentence of the paragraph that states: "These MS4 operators must submit a SWMP that is either separate from or shared with the other MS4 operators who are operating MS4s that are interconnected or located in the same urbanized area or located in the same watershed."

Response 358:

The fourth sentence of Part II.E.1. was revised in the re-noticed permit to: "These MS4 operators may combine or share efforts in meeting any or all of the SWMP requirements stated in Part III of this general permit." This will allow applicants with a shared SWMP to concurrently submit separate NOIs and attach to them a single shared SWMP that names each of the participating MS4 operators. The requested additional sentence is not necessary, as the permit clearly states that each MS4 operator must submit an NOI and attached SWMP. This is a requirement regardless of whether the systems or interconnected or located in the same urbanized area.

Comment 359:

Harris County requests that in the last sentence of Part II.E.1.(a) the phrase "a copy of the submitted NOI may be readily available" be modified by replacing "may" with "must."

Response 359:

The re-noticed permit was modified accordingly.

Comment 360:

Tyler comments that the language in Part II.E. differs from the fact sheet, which references co-permittees. Tyler states that the permit encourages cooperation without making the separate MS4s co-permittees, but that the fact sheet language may lead to confusion.

Response 360:

The fact sheet was modified for the re-noticed permit to remove the term "co-permittee" to better illustrate the intent of sharing SWMP implementation responsibilities.

Waivers

Comment 361:

DAFB comments that this part addresses two waiver options, but nowhere in the permit is there language to specifically identify what the options are. DAFB requests using subparagraph titles to specify that Part II.F.1 is Waiver Option 1 and Part II.F.2 is Waiver Option 2.

Response 361:

Part II.F.1. and Part II.F.2. were revised in the re-noticed permit to: *1. Waiver Option 1: The system serves a population of less than 1,000 within an urbanized area and meets the following criteria . . ." and "2. Waiver Option 2: The system serves a population under 10,000 and meets the following criteria: . . ..*

Comment 362:

Cleburne believes the permit should include the waiver request form so MS4 operators will know what specific information is required and will be able to make the request in a timely manner. Because the waiver form has not been published, operators should only be required to have their form submitted by the March 10, 2003, or other deadline, not have the waiver approved by that date. Cleburne comments that the MS4 operator should not be held responsible for the amount of time TCEQ will take to review and approve the waiver.

Response 362:

Inclusion of the waiver request form in the permit would limit the ability to revise the form during the term of the permit. The time frame for obtaining a waiver was modified in the re-noticed permit for consistency with the time frame for obtaining authorization. The following language was added at the end of the first paragraph of Part II.F. in the re-noticed permit:

A provisional waiver from permitting requirements begins two days after a completed waiver form is postmarked for delivery to the TCEQ. Following review of the waiver form, the executive director may: 1) determine that the waiver form is complete and confirm coverage under the waiver by providing a notification and a waiver number, 2) determine that the waiver form is incomplete and deny the waiver until a completed waiver form is submitted, or 3) deny the waiver and require that permit coverage be obtained.

Storm Water Management Program

Comment 363:

HCFCD comments that the requirement to prepare an SWMP appears restricted to MS4s where storm water discharges reach waters of the U.S. HCFCD is concerned that regulated small MS4s who discharge into a larger MS4 will incorrectly conclude that waters leaving their systems do not reach waters of the U.S. and will reach the conclusion that they are not obligated to develop and implement an SWMP. HCFCD urges that the permit include language indicating that MS4s with discharges to other MS4 systems draining to waters of the U.S. must prepare and implement an SWMP.

Response 363:

Authorization for discharges from a small MS4 or from construction sites where the MS4 operator is the construction site operator is required whether the discharge is directly or indirectly to waters of the United States. The first sentence of Part III. was revised in the re-noticed permit to: "To the extent allowable under state and local law, a SWMP must be developed and implemented according to the requirements of Part III of this general permit, for storm water discharges that reach waters of the United States, regardless of whether the discharge is conveyed through a separately operated storm sewer."

Comment 364:

HCFCD comments that the fourth line of the first paragraph contains a grammatical error and should read "to the maximum extent practicable and to effectively prohibit . . .." Cleburne comments that the sentence "the storm water management program must be developed to prevent pollution in storm water to the MEP, effectively prohibit illicit discharges to the system" is unclear. Cleburne requests rephrasing the sentence.

Response 364:

The second sentence of Part III. was revised in the re-noticed permit to: "The SWMP must be developed to prevent pollution in storm water to the maximum extent practicable (MEP) and to effectively prohibit illicit discharges to the system."

Comment 365:

Dodson comments that the language of each of the MCMs is not consistent and requests that the beginning of each MCM include the following language: "The MS4 operator must . . .." This additional language will help MS4 operators understand the minimum requirements.

Response 365:

The following two sentences were added to the first paragraph of Part III of the re-noticed permit: "The small MS4 operator must develop the SWMP to include the six minimum control measures described in Part III.A.1. through 6. The MS4 operator may develop and include the optional seventh minimum control measure in Part III.A.7."

Public Education and Outreach On Storm Water Impacts

Comment 366:

TxDOT and Carter & Burgess comment that the public education requirements are less flexible, more prescriptive, counterproductive, and potentially more costly to Phase II MS4s than those required by EPA. TxDOT believes that the specific list included in Part III.A.1.(a) limits the flexibility necessary for some agencies to develop educational programs that are appropriately tailored to both the community and the MS4 operator's responsibility and function within that community. TxDOT requests omitting or referring to the specific community constituents listed in Part II.A.1.(a) as examples of groups with the MS4 that may be targeted.

TCCOS and Mathews & Freeland comment that the permit language in this subpart is confusing because it appears that small MS4 operators are required to either distribute educational materials or conduct equivalent outreach activities. However, TCCOS and Mathews & Freeland contend that the list of groups to inform within the MS4 area and the content included in the outreach only appear to apply to the second option. TCCOS and Mathews & Freeland request revising the permit after the description of item 1 to: *A section of the SWMP must be developed to include: (a) A public education program to distribute educational materials to the community; or (b) Equivalent outreach activities that will be used to inform the following groups within the MS4 area* . . .. DAFB requests changing in Part III.A.1.(a) the word "outreach" with "outreach program." DAFB also recommends changing the words "minimize their impact" to "minimize the impact."

Response 366:

A list of specific groups was included in the permit to demonstrate the many segments of the public that this MCM should address. The re-noticed permit was modified to allow flexibility when determining what groups to target. Part III.A.1(a) was revised to: "A public education program must be developed to distribute educational materials to the community or to conduct equivalent outreach activities that will be used to inform the public. The MS4 operator may determine the most appropriate sections of the population at which to direct the program. The MS4 operator must consider the following groups and the SWMP must provide justification for any listed group that is not included in the program . . .."

Additionally, the concluding paragraph of Part III.A.1.(a) was modified in the re-noticed permit to: "The outreach must inform the public about the impacts that pollution in storm water run-off can have on water quality, hazards associated with illegal discharges and improper

disposal of waste, and ways they can minimize their impact on storm water quality."

Comment 367:

DFW, Lloyd Gosselink, Dodson, Carter & Burgess, Dodson, TCCOS, and Mathews & Freeland comment that the meaning of the term "reasonable attempt" used in Part III.A.1.(b) is unclear. The commenters request either defining or deleting the term. DAFB requests revising the permit language that states: "Via documentation, the MS4 operator must ensure that a reasonable attempt was made . . ." to: "The SMS4 operator must ensure that a reasonable attempt was made . . . and maintain documentation thereof." HCFCD suggests the wording: "During program implementation, the MS4 operator must document that reasonable attempts to reach all constituents within the MS4 area to meet this measure were made." TCCOS and Mathews & Freeland comment that the term "ensure" as used in this subpart is subjective and should not be used in the permit. TCCOS and Mathews & Freeland also comment that the term "constituents" is confusing because it is not used properly, as it means "one who authorizes another to act for him or one of a group who elects another to represent him in public office."

NCTCOG, Freese & Nichols, and Farmers Branch request deleting "all" from paragraph (b). Tarrant County recommends reserving the terms "must" and "all" for permit elements that are likely to result in enforcement actions by TCEQ. Tarrant County suggests changing "must ensure that a reasonable attempt . . ." to "should ensure . . ." and remove the word "all" in front of "constituents." Group 1 requests modifying the language from "all constituents . . ." to "the community . . ." and notes that there is no requirement in the federal rules that all constituents must be reached within an urbanized area. Cleburne recommends changing Part III.A.1.(b) to: "The MS4 operator must ensure and document that a reasonable attempt was made to reach all constituents within the MS4 area to meet this measure."

Response 367:

Part III.A.1.(b) was revised in the re-noticed permit to: "The MS4 operator must document activities conducted and materials used to fulfill this control measure. Documentation shall be detailed enough to demonstrate the amount of resources used to address each group. This documentation shall be retained in the annual reports required in Part IV.B.2. of this general permit."

Public Involvement/Participation

Comment 368:

Farmers Branch, DAFB, TCCOS, Dodson, Lloyd Gosselink, Group 1, and Mathews & Freeland question the use of the phrases "all constituents" and "sufficient opportunities" used in this section. NCTCOG and Farmers Branch recommend deleting paragraphs (a) and (c) from the permit language or if the paragraphs remain, deleting the word "all" from paragraphs (a) and (b) and changing the word "must" to "may or should" in paragraphs (a) and (b). NCTCOG and Farmers Branch comment that paragraph (b) is sufficient for compliance at the level that most Phase II entities are capable of with their limited resources.

Tarrant County asks for an evaluation of the terms "all" and "must" for appropriate usage in this section. If the term "must" is retained, then it should only apply to Part III.A.2.(b), resulting in the deletion or modification of both (a) and (c). The reason for this is the inordinate amount of limited resources that are spent by an MS4 operator on this measure. EPA's Phase II model permit required the wording in (b), but did not require the degree of expenditures and time that are expressed in both (a) and (c). TCCOS, Freese & Nichols, and Mathews & Freeland comment that the requirements of this subpart exceed EPA requirements that require small MS4s comply with state and local public notice requirements. TCCOS and Mathews & Freeland request revising the permit language to limit the requirement to mirror EPA's, thereby deleting language in (a) and (c).

Cleburne recommends deleting Part III.A.2.(c) because it is redundant and recommends adding the sentence "Public involvement and participation program efforts must be documented" to Part III.A.2.(a). Additionally, Cleburne suggests the statement exempting correctional facilities from this control would then become subpart (b) and read as follows, *(b) Correctional facilities will not be required to implement this MCM.*

Group 1 comments that the second sentence of Part II.A.2.(a) elevates an EPA recommendation to a requirement and requests modifying the sentence to state: "It is recommended that the program include provisions to allow opportunities for all constituents within the MS4 area to participate in the storm water management program development and implementation."

Response 368:

Part III.A.2. was revised in the re-noticed permit to consolidate (a), (b), and (c) into a single statement of what the MCM requires and to follow the language in 40 C.F.R. §122.34(b)(2)(i). The modified section was changed to:

2. Public Involvement/Participation

The MS4 operator must, at a minimum, comply with any state and local public notice requirements when implementing a public involvement/participation program. It is recommended that the program include provisions to allow all members of the public within the MS4 the opportunity to participate in SWMP development and implementation. Correctional facilities will not be required to implement this MCM.

Illicit Discharge Detection and Elimination

Comment 369:

TCUC, BCES, TAOC, TxDOT, Tarrant County, and Harris County comment that wherever this section requires MS4s to establish an ordinance or other regulatory mechanism, it needs to include the statement "to the extent allowable under state and local law." V&E requests modifying the illicit discharge detection and elimination MCM to include the phrase "to the extent allowable under state and local law." NCTCOG requests including the allowance for "other regulatory mechanism" in all sections requiring an ordinance.

Response 369:

The final NPDES Phase II federal storm water regulations, 64 FR 68721, 68766 (1999) state that a small MS4 cannot simply fail to pass ordinances necessary to administer and enforce the required MCMs that constitute the bulk of the SWMP. The regulations state that "a small MS4 operator that seeks to implement a program under section 40 C.F.R. §122.34(b) may omit a requirement to develop an ordinance or other regulatory mechanism only to the extent its municipal charter, state constitution or other legal authority prevents the operator from exercising the necessary authority." The third sentence of Part III.A.3.(a) was revised in the re-noticed permit to: "To the extent allowable under state and local law, an ordinance or other regulatory mechanism must be utilized to prohibit and eliminate illicit discharges."

Additionally, Part III.A.3.(a)(2) was changed to: "The SWMP must include appropriate actions and, to the extent allowable under state and local law, establish enforcement procedures for removing the source of an illicit discharge. Where the permittee lacks the authority to develop ordinances or to implement enforcement actions, the information

regarding the illicit discharge may be referred to the TCEQ's regional field office."

Comment 370:

NCTCOG comments that the federal storm water regulations list certain non-storm water discharges that require addressing only if determined to contribute pollutants. However, Part III.A.3.(b) states that these discharges "must be considered by the permittee to determine if they are a significant contributor of pollutants to the MS4." NCTCOG comments that this seems to remove the assumption that these discharges are allowable. NCTCOG asks that TCEQ provide guidance to clarify that the intent of TPDES is not to exceed NPDES provisions on allowable discharges. Group 1 comments that the current language opens the door for monitoring programs and studies that are clearly excluded from the Phase II program and asks how MS4 operators are to determine if discharges are a significant contributor of pollutants. Group 1 requests modifying the language as follows: "All non-storm water flows, including those listed in Part II.B. and Part VII.B., must be addressed by the permittee only if they are identified as a significant contributor of pollutants to the MS4." Freese & Nichols recommends the following revision to the language because it does not agree with Part II.B.: "If the non-storm water discharges, including those listed in Part II.B. and Part VII.B, are determined to be significant contributors, they must be considered by the permittee." Grand Prairie recommends that this section include an assumption that these non-storm water discharges are not significant contributors of pollutants to the MS4 because it believes that the language as written implies that sampling or some other type of detection are required for these discharges.

Response 370:

This section is in accordance with the final federal Phase II regulations. 40 C.F.R.§122.34(b)(3)(iii) states that small MS4s must address certain categories of non-storm water discharges "only if you identify them as significant contributors of pollutants to your small MS4." The categories of non-storm water discharges listed in §122.34(b)(3)(iii) are those listed in Part II.B.(a) - (o) of the permit. It is not the intent to require that the MS4 operator perform water quality studies or to require monitoring programs to test and verify the effect of the listed "allowable" non-storm water discharges.

One option the MS4 operator has is to incorporate the consideration of non-storm water discharges as a part of a dry weather screening program, which complies with the permit requirement for the illicit discharge detection and elimination MCM. To implement the MS4 operator would screen the entire system within the five-year term of the permit for dry weather flows. When a flow is detected, it is traced to the source. If it is determined that the flow is a non-storm water source listed in Part II.B or Part VI.B, it is an allowable non-storm discharge, unless the MS4 operator determines it is a significant source of pollutants. In making this determination, the MS4 operator may consider the conditions of the receiving water, noting any change that can be attributed to the dry weather flow, such as color, foam, changes in the aesthetic qualities, or obvious toxic effects to aquatic organisms and algal communities. The MS4 operator may also consider the physical character of the discharge itself. Finding the source as a potentially allowable non-storm water discharge and lacking the example indications for the presence of significant pollutants the MS4 operator could conclude that the source is not a significant source of pollutants. Alternatively, if the discharge remains suspect, the MS4 operator can sample and conduct laboratory analyses for a range of suspected pollutants.

However, the first sentence of Part III.A.3.(b) was revised in the renoticed permit to include the following clarification: "Non-storm water flows listed in Part II.B and Part VI.B. do not need to be considered by the MS4 operator as an illicit discharge requiring elimination unless the operator of the MS4 or the executive director identifies the flow as a significant source of pollutants to the MS4."

Comment 371:

TCCOS and Mathews & Freeland comment that the permit does not explain the difference between illicit discharges and non-storm water discharges and asks why two separate programs are necessary. TCCOS and Mathews & Freeland request that TCEQ revise the permit to require only a single program to "detect and eliminate purposefully constructed connections between industrial processes and sewage collection systems and the MS4." TCCOS and Mathews & Freeland request combining and revising subparts (a) and (b) to state:

(a) Illicit Discharges: A section within the SWMP must be developed to establish a program to detect and eliminate illicit connections to the MS4. The SWMP must explain how the entire MS4 will be inspected for illicit connections during the term of the permit and what methods will be used to eliminate such connections. If the non-storm water flows originate from the activities conducted by persons other than the permittee, the method to eliminate such connections may be limited to the permittee giving notice to TCEQ of such illicit connections.

Dodson comments that there may be confusion regarding items (b) and (c) and asks whether incidental non-storm water discharges also will be addressed when the MS4 evaluates all its non-storm water discharges as part of the MCM. Dodson requests deleting item (c). Cleburne comments that the last sentence of Part III.A.3.(c) is redundant since detection and elimination of illicit discharges is required in Part II.A.3.(a). DAFB requests a definition of "illegal dumping" as the term is used in Part III.A.3.(b).

NCTCOG comments that federal storm water regulations list certain non-storm water discharges that require addressing only if determined to contribute pollutants. However, the permit states that these discharges must be considered by the permittee to determine if they are significant contributors of pollutants to the MS4. NCTCOG comments that this seems to remove the assumption that these discharges are allowable. At minimum, TCEQ should provide guidance to clarify that the intent of TCEQ is not to exceed NPDES provisions on allowable discharges. Group 1 comments that the current language opens the door for monitoring programs and studies that are clearly excluded from the Phase II program and asks how MS4 operators are to determine if discharges are a significant contributor of pollutants.

Group 1 requests modifying the language as follows: "All non-storm water flows, including those listed in Part II.B. and Part VII.B., must be addressed by the permittee only if they are identified as a significant contributor of pollutants to the MS4." Freese & Nichols recommends the following revision to the language because it does not agree with Part II.B.: "If the non-storm water discharges, including those listed in Part II.B. and Part VII.B, are determined to be significant contributors, they must be considered by the permittee." Grand Prairie recommends that this section include an assumption that these non-storm water discharges are not significant contributors of pollutants to the MS4 because it believes that the language as written implies that sampling or some other type of detection is required for these discharges.

Response 371:

This MCM requires that the MS4 operator either identify and eliminate illicit discharges to the MS4 or develop a protocol for allowing certain non-storm water discharges. Illicit discharges may include unregulated wastewater contributions to the MS4 that may stem from direct purposefully constructed illicit connections, from accidental connections, or simply from improper disposal practices. Therefore, this requirement cannot be limited to only "purposefully constructed connections." Similarly, the MS4 operator must eliminate other non-storm water dis-

charges, including those listed in Part II.B. of the permit, when it determines that these sources are significant contributors of pollutants to the small MS4.

It is not the intent to require that the MS4 operator perform water quality studies or to require monitoring programs to test and verify the effect of the listed "allowable" non-storm water discharges. Illicit discharge is defined at 40 C.F.R. §122.26(b)(2) as any discharge to a municipal separate storm sewer that is not composed entirely of storm water, except discharges pursuant to an NPDES permit and discharges resulting from fire fighting activities. The final NPDES Phase II federal storm water regulations, 64 FR 68721, 68756 (1999) further state: "As detailed below, other sources of non-storm water, that would otherwise be considered illicit discharges, do not need to be addressed unless the operator of the MS4 identifies one or more of them as a significant source of pollutants into the system." Part III.A.3.(b) and (c) were merged into a new (b) in the re-noticed permit as follows:

(b) Allowable Non-Storm Water Discharges

Non-storm water flows listed in Part II.B and Part VI.B. do not need to be considered by the MS4 operator as an illicit discharge requiring elimination unless the operator of the MS4 or the executive director identifies the flow as a significant source of pollutants to the MS4. In lieu of considering non-storm water sources on a case-by-case basis, the MS4 operator may develop a list of common and incidental non-storm water discharges that will not be addressed as illicit discharges requiring elimination. If developed, the listed sources must not be reasonably expected to be significant sources of pollutants either because of the nature of the discharge or the conditions that have been established by the MS4 operator prior to accepting the discharge to the MS4. All local controls and conditions established for these discharges must be described in the SWMP and any changes from the initial SWMP must be included in the annual report described in Part IV.B.2. of this general permit.

Comment 372:

NCTCOG, TCCOS, TxDOT, Cleburne, Group 1, and Mathews & Freeland comment that the mapping requirement in the permit requires more than what is required by the federal NPDES regulations. NCTCOG comments that requiring the MS4 operator to detail the location of all major outfalls, provide the source of information used to develop the map, provide information on how the outfalls were verified, and how the map will be regularly updated places a heavy burden on MS4s that have limited resources for accurate mapping. TCCOS and Mathews & Freeland request revising the mapping requirement to allow individual MS4 operators to develop maps that are appropriate for their needs. TCCOS and Mathews & Freeland request revising this subpart of the permit to state the following: *A map of the storm sewer system must be developed and must include the following: (1) the location of all outfalls; (2) the names and locations of all waters of the U.S. that receive discharges from the outfalls; and (3) any additional information needed by the permittee to implement its SWMP*. TCCOS and Mathews & Freeland request that the permit require that the map itself contain a brief description of how it was developed, to avoid vast amounts of information being contained within the SWMP. Group 1 comments that the federal rule does not require the MS4 operator to include the source of information used to develop the storm sewer map, including how the outfalls were verified and how the map will be regularly updated in the SWMP and recommends deleting this requirement.

Harris County and TAOC request revising the phrase "the location of all major outfalls" to "the location of all major outfalls or other sites that will allow the permittee to locate and trace illicit discharges to the MS4." Tarrant County requests modifying the permit from "the location of all major outfalls" to "the location of all major outfalls or other sites that will allow the permittee to locate and trace illicit discharges to the MS4." Group 1 recommends affording small municipalities the flexibility to trace illicit discharges from the identified source at the receiving stream without the use of detailed storm sewer collection system maps, if feasible. Harris County and TAOC comment that requiring the MS4 operator to show the locations of all waters of the U.S. receiving discharges from the outfalls is overly broad and burdensome and request deleting it from these subsections.

Response 372:

The federal regulations at 40 C.F.R. §122.34(b)(3)(ii)(A) and adopted by reference in 30 TAC §281.25 state that a small MS4 operator must develop "a storm sewer system map, showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls." The mapping requirement does not distinguish between "major outfalls" and other outfalls. Additionally, the requirement that the MS4 operator show the location of all waters of the U.S. receiving discharges follows the federal requirement.

Part III.A.3.(c)(1) was revised in the re-noticed permit to require that the storm sewer map show the location of all outfalls and to name and locate waters of the U.S. that receive discharges from these outfalls. MS4 operators may include any additional features or information, including information on how the map was developed, that are advantageous to their needs. Part III.A.3.(d)(1) was changed to:

(1) A map of the storm sewer system must be developed and must include the following:

(i) the location of all outfalls;

(ii) the names and locations of all waters of the U.S. that receive discharges from the outfalls; and

(iii) any additional information needed by the permittee to implement its SWMP.

Comment 373:

TCCOS and Mathews & Freeland request that the permit clarify that the storm sewer map may be developed during the term of the permit.

Response 373:

The federal regulations allow MS4 operators up to five years from the date this permit is issued to fully develop and implement their SWMP (40 C.F.R. §122.34(a)). The map is a part of the SWMP and, as such, must be fully developed prior to the end of the five-year permit term. Therefore, an MS4 operator may continue to develop the map throughout the term of the permit. A sentence was added at the end of the introductory paragraph to Part III. in the re-noticed permit that states: "Small MS4s have five years from the date of issuance of this general permit to fully implement their SWMP." This sentence clarifies that this time frame applies not only to the storm sewer map, but to the entire SWMP.

Pollution Prevention/Good Housekeeping for Municipal Operations

Comment 374:

Group 1 requests modifying the language in Part III.A.4.(a) as follows: "Develop and implement an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations." TCCOS and Mathews & Freeland request, in order to avoid ambiguity, that TCEQ use the language of the EPA's rule to define the scope of this MCM as follows: *4. Pollution Prevention/Good Housekeeping for Permittee Operations: A section within the SWMP must be developed to establish an operation and maintenance program that includes a train-*

ing program and has the ultimate goal of preventing or reducing pollutant runoff from operations controlled by the operator of the small MS4. The program must include employee training to prevent or reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance.

Response 374:

To more closely follow the federal rule for the pollution prevention/good housekeeping MCM at 40 C.F.R. §122.34(b)(6)(i), Part III.A.4 and A.4.(a) were modified in the re-noticed permit to:

4. Pollution Prevention/Good Housekeeping for Municipal Operations

A section within the SWMP must be developed to establish an operation and maintenance program, including an employee training component, that has the ultimate goal of preventing or reducing pollutant runoff from municipal operations.

(a) Good Housekeeping and Best Management Practices (BMPs)

Housekeeping measures and BMPs (which may include new or existing structural and non-structural controls) must be identified and either continued or implemented with the goal of preventing or reducing pollutant runoff from municipal operations. Examples of municipal operations and municipally owned areas include, but are not limited to . . ..

Comment 375:

Group 1 requests modifying the language at Part III.A.4.(b) as follows: "Using training materials that are available from EPA, your State, Tribe, or other organizations, your program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance."

Response 375:

Although the permit language does not limit the MS4 operator from obtaining training materials from a separate source, the language of Part III.A.4.(b) in the re-noticed permit was revised to: "A training program must be developed for all employees responsible for municipal operations subject to the pollution prevention/good housekeeping program. The training program must include training materials directed at preventing and reducing storm water pollution from municipal operations. Materials may be developed, or obtained from the EPA, states, or other organizations and sources. Examples or descriptions of training materials being used must be included in the SWMP."

Comment 376:

TCCOS and Mathews & Freeland comment that the Part III.A.4.(d) states that wastes must be properly disposed of and asks what is meant by "waste" in this provision. TCCOS and Mathews & Freeland ask if it includes all of the MS4, which would include all municipal streets.

Response 376:

The provision includes waste removed from the MS4, which would include streets that are designed and utilized for storm water conveyance and from maintenance of any storm water control structures. For clarification, the first sentence of Part III.A.4.(d) was changed in the re-noticed permit to: "Waste removed from the MS4 and waste that is collected as a result of maintenance of storm water structural controls must be properly disposed. A section within the SWMP must be developed to include procedures for the proper disposal of waste, including . . .."

Comment 377:

Group 1 comments that municipally owned industrial facilities are regulated by separate TPDES permits that have no connection to the MS4 permit. Group 1 requests deleting the final paragraph requiring information on storm water associated with industrial activities. TCCOS and Mathews & Freeland ask if the permit only requires that the SWMP list all municipally owned industrial activities. TCCOS and Mathews & Freeland further inquire if the State of Texas in its SWMP for the Capital Complex fails to list all of the TxDOT construction projects would this be a violation of its authorization under the permit? Harris County requests revising the permit to require that if the MS4 operator has not yet received a letter of acknowledgment for an NOI or NOC submitted for an industrial storm water discharge, that the MS4 operator "must," rather than "may," make a copy of the NOI or NOC readily available.

Response 377:

SWMPs for each state owned, operated, and permitted MS4 are not required to address every industrial activity performed by all state agencies throughout Texas. In the example, TxDOT may submit an NOI for each of their districts, as these storm sewer systems are operated through each district office. The NOI and SWMP would address the separate storm sewer systems that lie within urbanized areas and that are located within the jurisdiction of the district. The SWMP would address industrial activities conducted by the district TxDOT office that are not subject to, and authorized under TPDES general permit TXR050000. Another MS4 operated by another state agency, and subject to the provisions of this permit, would similarly address industrial activities. The final paragraph of Part III.A.4.(e), concerning storm water discharges subject to TPDES general permit TXR05000 was deleted from the re-noticed permit.

Construction Site Storm Water Runoff Control

Comment 378:

NCTCOG, Tarrant County, and TAOC request revising the requirements in this MCM to provide for enforcement to reflect that the MS4 operator must do so "to the extent allowable under State and local law." TAOC states that the permit should specify how TCEQ will handle the program for entities lacking enforcement authority.

Response 378:

The first sentence at Part III.A.5. was revised in the re-noticed permit to: "The MS4 operator, to the extent allowable under state and local law, must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre or if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more of land." In addition, Part III.A.5.(c)(3) was changed to: *(3) site inspection and enforcement of control measures to the extent allowable under state and local law*.

Comment 379:

NCTCOG requests revising the second sentence of Part III.A.5. to "from sites where TCEQ has waived the permitting requirements . . ." instead of "from sites that TCEQ has waived the permitting requirements . . .." Harris County comments that the permit should clarify in what situation, such as a rainfall erosivity factor of less than five, TCEQ would waive permitting requirements for storm water discharges associated with small construction activities. Harris County requests clarification on the situation addressed by the following sentence: "The MS4 operator is not required to develop, implement, and/or enforce a program to reduce pollutant discharges from sites that TCEQ has waived the permitting requirements for storm water discharges associated with small construction activities." NCTCOG and Farmers Branch recommend substituting the word "where" for the word "that" in the follow-

ing phrase: "to reduce pollutant discharges from sites that TCEQ has waived . . .."

Response 379:

The second sentence of Part III.A.5. was revised in the re-noticed permit to: "The MS4 operator is not required to develop, implement, and/or enforce a program to reduce pollutant discharges from sites where the construction site operator has obtained a waiver from permit requirements under NPDES or TPDES construction permitting requirements based on a low potential for erosion."

Post-Construction Storm Water Management in New Development and Redevelopment

Comment 380:

Tarrant County, Harris County, and TAOC recommend inserting the wording "to the extent allowable under State and local law" at the beginning of the first paragraph in Part III.A.6.

Response 380:

The first sentence of Part III.A.6. was revised in the re-noticed permit to: "To the extent allowable under state and local law, the MS4 operator must develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre of land, including projects less than one acre that are part of a larger common plan of development or sale that will result in disturbance of one or more acres, that discharge into the MS4."

Comment 381:

DAFB recommends revising the permit language in Part III.A.6.(a) that requires the development of structural and/or non-structural BMPs "appropriate for your community" to state that they are "appropriate for the community."

Response 381:

The suggested revision was made to Part III.A.6.(a) in the re-noticed permit.

Authorization for Municipal Construction Activities

Comment 382:

DAFB requests revising the permit language in Part III.A.7. to remove the word "initial" from the sentence in the opening paragraph that reads: "This MCM must be developed as a part of the SWMP that is submitted with the initial NOI for permit coverage."

Response 382:

Part III.A.7. was revised as recommended in the re-noticed permit.

Comment 383:

Group 1 notes that there is a typographical error in the second sentence of the opening paragraph of Part III.A.7.: "conditions of this of this general permit . . .." Cleburne recommends deleting from the second sentence the words "compliant with the conditions of this of this general permit."

Response 383:

The second sentence of Part III.A.7. was changed in the re-noticed permit to: "Additionally, contractors working for the permittee are not required to obtain a separate authorization if they do not meet the definition of a 'construction site operator,' as long as the permittee meets the status of construction site operator."

(In first draft permit, deleted in re-noticed draft permit) - Numeric Effluent Limitations

Comment 384:

TCUC, Tarrant County, NCTCOG, Dodson, Lloyd Gosselink, Cleburne, TCCOS, TAOC, Group 1, BCES, and Mathews & Freeland question whether to include this section in the permit. Commenters note that effluent limits for batch plants are covered under Part VI.D. of the permit. Grand Prairie requests any monitoring of storm water runoff from concrete batch plants be done by the owner/operator of the batch plant rather than the MS4.

Response 384:

This section was deleted from the re-noticed permit. The effluent limits for concrete batch plants apply only to MS4s that utilize the seventh MCM and seek authorization for storm water discharges from concrete batch plants associated with municipal construction activity. The effluent limits relating to construction site runoff are included in Part VI.D. of the permit.

Recordkeeping

Comment 385:

DAFB requests clarification regarding the permit language in Part IV.A.2. that states "must be retained at a location accessible to the permitting authority." DAFB asks if it is TCEQ's intent that the SWMP will be at a location that allows the permitting authority to retrieve it at will. If this is not the intent, DAFB requests revising the permit to state that the SWMP must be made available to TCEQ personnel.

Response 385:

Part IV.A.2. was revised in the re-noticed permit to: "The permittee must submit the records to the executive director only when specifically asked to do so. The SWMP required by this general permit (including a copy of the general permit) must be retained at a location accessible to the TCEQ."

Comment 386:

BCES, Carter & Burgess, Cleburne, Farmers Branch, Freese & Nichols, GCHD, Grand Prairie, Lloyd Gosselink, NCTCOG, Tarrant County, TAOC, TCCOS, TCUC, V&E, and Mathews & Freeland recommend revising Part IV.A.3 to require following the Texas Public Information Act when information is requested. Lloyd Gosselink comments that the provision is an unlawful contravention of the Act and that TCEQ has not been given the authority to contravene the clear wording and intent of the Act. GCHD requests clarification about what is meant by the phrase "making the records available to the public."

Response 386:

The language in Part IV.3. was changed in the re-noticed permit to allow ten business days for the MS4 to provide copies of the NOI and SWMP when requested by the general public in writing. The section was further modified to specify that other records requested are subject to the requirements of the Texas Public Information Act. Part IV.A.3. was revised to: "The permittee must make the NOI and the SWMP available to the public if requested to do so in writing. Copies of the SWMP must be made available within 10 working days of receipt of a written request. Other records must be provided in accordance with the Texas Public Information Act. However, all requests for records from federal facilities must be made in accordance with the Freedom of Information Act."

Comment 387:

DAFB comments that Part IV.A.3. details specific conditions when the MS4 operator must make the SWMP available to the public. DAFB requests an explanation of how these requirements interact with the Free-

dom of Information Act (FOIA) requests at federal institutions (i.e., Army posts, Air Force bases, etc.).

Response 387:

Documents submitted to TCEQ are subject to the Texas Public Information Act. Thus, copies of the NOI and SWMP submitted to the agency are a matter of public record and are available to the general public from TCEQ. If a member of the general public requests information directly from a federal facility, the request must comply with the FOIA. Federal agencies are tasked with complying with the FOIA. Per the previous response to comment, language was added to the provision to state that requests for records from federal facilities must be provided in accordance with the FOIA.

Reporting

Comment 388:

DAFB requests a definition for "relevant facts" found in Part IV.B.1.(c).

Response 388:

This term is only used in this section of the permit regarding when an MS4 operator should correct or supply missing information in a report, NOI, NOT, or NOC. To more clearly explain how an MS4 operator should correct information submitted to TCEQ, Part IV.B.1.(b) was changed in the re-noticed permit to: "When the permittee becomes aware that it either submitted incorrect information or failed to submit complete and accurate information requested in an NOI, NOT, or NOC, or any other report, it must promptly submit the facts or information to the executive director."

Comment 389:

DAFB requests including either a definition of the term "authorized TCEQ personnel" as used in this subpart and in Part VI.I.2. in the permit or revising the permit language to "TCEQ personnel." DAFB notes that if it is necessary to distinguish a category of TCEQ personnel that are authorized, then there must be some TCEQ personnel who are not authorized.

Response 389:

The term "authorized TCEQ personnel" was changed to "TCEQ personnel" in Part IV.B.2. of the re-noticed permit.

Comment 390:

TCUC, Tarrant County, BCES, Lloyd Gosselink, Carroll & Blackman, Grand Prairie, TAOC, NCTCOG, Farmers Branch, Cleburne, TCUC, Freese & Nichols, and Harris County request clarification in Part IV.B.2. regarding what the reporting year is and exactly when the annual reports are due.

Response 390:

The re-noticed permit was revised to state that the annual report covers the calender year from January 1 through December 31 and that the report for that year is due 90 days after the end of that calender year on March 31st. However, the language was changed again in response to the comments received on the re-noticed permit. See Response 272 for final resolution of this issue.

Comment 391:

NCTCOG and Farmers Branch comment that TCEQ should allow the inclusion in the existing BMPs of the MS4 in Part IV.B.2.(c) any MCM that was initiated before the permit was issued. The time frame should go beyond the three-year limit stated in the permit language. Part III. of the permit states that: "Existing programs or BMPs may be used to fulfill the requirements of this general permit." This statement does not specify any time limit and, therefore, it should allow an MS4 operator to include any activities it has performed in the past. Group 1 comments that the language is not found in the federal rules and any information regarding activities conducted prior to the required compliance date is irrelevant and could be confusing to TCEQ inspectors and the public. Group 1 requests deleting this item.

Response 391:

Programs in place prior to when this permit is issued may be included in the SWMP as appropriate and TCEQ revised this provision to remove the three-year limitation. Part IV.B.2.(c) was changed in the re-noticed permit to: "Any MCM activities initiated before permit issuance may be included, under the appropriate headings, as part of the first year's annual report . . .."

Comment 392:

Group 1 requests modifying the language in Part IV.B.2.(d) to make it clear an MS4 operator is only required to report monitoring data if any is acquired and suggests that the provision state: "Results of information collected and analyzed, including monitoring data, if any, during the reporting period."

Response 392:

Part IV.B.2.(d) was revised in the re-noticed permit to: "A summary of the results of information (including monitoring data) collected and analyzed, if any, during the reporting period used to assess the success of the program at reducing the discharge of pollutants to the MEP . . .."

Comment 393:

NCTCOG and Farmers Branch recommend removing Part IV.B.2.(e) because an implementation schedule is already provided in the plan. Group 1 requests modifying the language because there is no requirement in the federal rules to develop an implementation schedule for the future permit year and suggests the following revision: "A summary of the storm water activities you plan to undertake during the next reporting cycle."

Response 393:

During compilation of the annual report, MS4 operators may determine changes to existing implementation schedules and activities. The annual report is an important place to record these changes or additional activities. Part IV.B.2.(e) was revised in the re-noticed permit to eliminate the ending phrase "(including an implementation schedule)" and now reads: "A summary of the storm water activities the MS4 operator plans to undertake during the next reporting cycle . . .."

Comment 394:

NCTCOG and Farmers Branch comment that the term "co-permittee" as used in Part IV.B.2.(j) is not found in any other part of the permit and that the potential relationship between a permittee under the general permit and a permittee under an individual permit is not clear in the general permit. NCTCOG and Farmers Branch comment that this may be an appropriate topic for a guidance document. TCCOS, Group 1, and Mathews & Freeland recommend removing this provision from the permit or that TCEQ develop a co-permitting option. Cleburne suggests adding a definition of the term if co-permitting is an option for obtaining permit coverage.

Response 394:

The term "co-permittee" used to describe the option of multiple MS4 operators participating in a shared SWMP was changed. While each MS4 operator that shares an SWMP must submit its own annual report, the report can be a copy of the report that was developed by all of the SWMP participants. Therefore, a sentence was added to Part IV.B.2. after (i) in the re-noticed permit to state: "If permittees share

a common SWMP, all permittees must contribute to a system-wide report (if applicable) . . .."

Comment 395:

NCTCOG and Farmers Branch inquire if the reference in Part IV.B.2.(k) to Part VII.E.1.(a) should actually be to Part VI.6. or be Part II.D.4.(b)(8). Cleburne notes there is an incorrect reference to Part VII.E.1.(a) and it should be changed to: "Each permittee must sign and certify the annual report in accordance with 30 TAC §305.128; and . . .."

Response 395:

A sentence was added in Part IV.B.2. in the re-noticed permit to state: "Each permittee must sign and certify the annual report in accordance with 30 TAC §305.128 (relating to Signatories to Reports); and . . .."

Comment 396:

Lloyd Gosselink and Carroll & Blackman recommend changing TCEQ's Web address in Part IV.B.2.(l) to *www.tceq.state.tx.us* from *www.tnrcc.state.tx.us*.

Response 396:

This change was made in the re-noticed permit. Currently, both Web addresses will take you to the TCEQ homepage.

Standard Permit Conditions

Comment 397:

Cleburne recommends deleting the language in Part V.E. referencing the CWA pretreatment programs and issued permits because these references are not pertinent to MS4 storm water discharges. The MS4 operator does not control EPA, state, or POTW issued permits and therefore this requirement should not be included here. Cleburne suggests the following language instead: *(a) negligently or knowingly violating CWA 301, 302, 306, 307, 308, 318, or 405, ...*

Response 397:

This condition is taken directly from federal rules at 40 C.F.R. §122.41(a)(2) that applies to conditions applicable to all permits and therefore is retained. However, because MS4s authorized under this permit are not typically part of the NPDES approved pretreatment program, Part V.E.(a) was revised in the re-noticed permit to remove the phrase "or any requirement imposed in a pretreatment program approved under CWA, §402(a)(3) or §402(b)(8)."

Authorization for Municipal Construction Activities

Comment 398:

TCCOS and Mathews & Freeland believe that if an operator of a small MS4 elects to use the seventh MCM to authorize its construction activities, the operator of the MS4 is required to prepare SWP3s for all construction sites with a land disturbance greater than one acre. This is regardless of whether the construction activity is automatically authorized pursuant to the terms of the CGP because it occurs during periods of low potential for erosion. TCCOS and Mathews & Freeland suggest that the permit clarify that the operator of a small MS4 that elects to implement the seventh MCM may choose to cover particular construction activities under the terms of the CGP rather than this permit. TCCOS and Mathews & Freeland recommend modifying Part VII as follows: "The MS4 operator may apply under TPDES general permit TXR150000 for authorization to discharge storm water runoff from each construction activity performed by the MS4 operator that results in a land disturbance of one (1) or more acres of land. Alternatively, the MS4 operator may develop the Storm Water Management Program to include this optional seventh storm water MCM if the eligibility requirements in Part VII.A. are met. If the MS4 operator includes this MCM within the description of the initial SWMP with the NOI or submits an NOC notifying the Executive Director of the addition of this MCM and identifying the geographic area or boundary where the activities will be conducted under the provisions of this permit, and meets the terms and requirements of this permit, discharges from these construction activities may be authorized under this general permit. Even if an MS4 operator has developed this optional seventh storm water MCM, the MS4 operator may apply under TPDES general permit TXR150000 for authorization for particular municipal construction activities including those activities that occur during periods of low potential for erosion (for which no SWP3 must be developed)."

Response 398:

The purpose of this optional MCM is to provide the MS4 with an alternative to the CGP, TPDES permit number TXR150000. The MS4 operator may elect to obtain coverage for some construction sites under this seventh MCM and elect to cover other construction sites under the TPDES CGP. To provide additional clarity, the introductory paragraph to Part VI of the re-noticed permit was revised to clarify that this alternative can only be used for construction activities that occur within the regulated portion of the MS4 and cannot be utilized for the portions of the MS4 that are located outside of an urbanized area unless the MS4 operator includes those areas in its authorization under this permit. The introductory paragraph to Part VI. was changed to:

"The small MS4 operator may obtain authorization under TPDES general permit TXR150000 to discharge storm water runoff from each construction activity performed by the MS4 operator that results in a land disturbance of one (1) or more acres of land. Alternatively, the MS4 operator may develop the SWMP to include this optional seventh (7th) storm water MCM if the eligibility requirements in Part VI.A. are met. If an MS4 operator decides to utilize this MCM, then the MS4 operator must include the MCM it in its SWMP submitted with the NOI or submit an NOC notifying the executive director of the addition of this MCM to its SWMP. The MS4 operator must identify the geographic area or boundary where the construction activities will be conducted under the provisions of this general permit. If the MS4 meets the terms and requirements of this general permit, then discharges from these construction activities may be authorized under this general permit as long as they occur within the regulated geographic area of the small MS4. Even if an MS4 operator has developed this optional seventh storm water MCM, the MS4 operator may apply under TPDES general permit TXR150000 for authorization for particular municipal construction activities including those activities that occur during periods of low potential for erosion (for which no SWP3 must be developed)."

Eligible Construction Sites

Comment 399:

Cleburne suggests the following editorial change: "Discharges from construction activities in which the MS4 operator meets the definition of construction site operator are eligible for authorization under this general permit."

Response 399:

Part VI.A. was changed in the re-noticed permit to: "Discharges from construction activities where the small MS4 operator meets the definition of construction site operator are eligible for authorization under this general permit."

Discharges Eligible For Authorization

Comment 400:

Cleburne believes that storm water flows should not be listed under Part VI.B. because permitting for construction under Part VI.B. is optional.

Flows from construction are either covered in Part VI.B. or by a separate TPDES storm water permit.

Response 400:

This section addresses only the construction activities that are authorized under this permit. However, Part VI.B.2. was revised in the re-noticed permit to reference "supporting" activities rather than "industrial" activities, which is consistent with the CGP. The initial paragraph of Part VI.B.2. was changed to:

2. Discharges of Storm Water Associated with Construction Support Activities

Discharges of storm water runoff from construction support activities, including concrete batch plants, asphalt batch plants, equipment staging areas, material storage yards, material borrow areas, and excavated material disposal areas may be authorized under this general permit provided . . ..

Comment 401:

DFW and V&E request clarification of the term "close proximity" used in Part VI.B.2.(a) relative to the authorization for discharges from batch plants supporting a construction activity. V&E further asks if an off site support activity that is used by the operator to support construction activities at different locations is eligible for coverage as long as the off site support area is identified and has storm water management controls for its area in one or more of the SWP3s for the individual construction projects. DAFB requests revising the permit language to state "or in proximity to the permitted . . .." DAFB also requests adding a definition of the "proximal interval in terms of a distance such as feet, yards, miles, etc."

Response 401:

The permit includes a provision for coverage of supporting industrial activities in order to provide an efficient means for obtaining the necessary authorization while encouraging coordinated pollution prevention activities between associated sites. The activities at supporting sites can be addressed in an SWP3 and authorized when the construction site operator submits the NOI for the construction activity. Because the authorization for these supporting sites is included in the authorization for the main construction activity, it is required that the supporting sites are located in close proximity to the actual construction activity. Where the supporting activities are remotely located, they may be authorized under the industrial storm water permit, TPDES permit number TXR050000.

While operating under that authorization, a site authorized under this provision can provide support to additional construction activities and also sell their services and products to the public in general. When the authorization for the supported construction activity is terminated, the supporting site may be covered under another authorized supported site by amending the SWP3 of the authorized site to include the off site supporting activity. Alternatively, the off site supporting activity may obtain coverage under the industrial storm water general permit.

To clarify what support activities are eligible for authorization, Part VI.B.2.(a) was changed in the re-noticed permit to: "the activity is located within a 1-mile distance from the boundary of the permitted construction site and directly supports the construction activity . . .." The one-mile distance requirement is consistent with the same requirement found in the CGP.

Comment 402:

V&E requests revising Part VI.B.3. to include all of the non-storm water discharges allowed under Part II.A.3. of the CGP. V&E recommends including trench dewatering flows in the list of allowable non-storm water discharges in this part. V&E notes that EPA has stated that dewatering of trenches is the same type of water as contemplated by the term "groundwater dewatering."

Response 402:

It is appropriate to utilize the same list of non-storm water discharges that is allowed under the CGP and this permit was revised to include an identical list as is in the TPDES CGP. Part VI.B.3. was changed in the re-noticed permit to:

3. Non-storm Water Discharges

The following non-storm water discharges from construction sites authorized under this general permit are also eligible for authorization under this MCM:

(a) discharges from fire fighting activities (fire fighting activities do not include washing of trucks, run-off water from training activities, test water from fire suppression systems, and similar activities);

(b) fire hydrant flushings;

(c) vehicle, external building, and pavement wash water where detergents and soaps are not used and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);

(d) water used to control dust;

(e) potable water sources including waterline flushings;

(f) air conditioning condensate; and

(g) uncontaminated ground water or spring water, including foundation or footing drains where flows are not contaminated with industrial materials such as solvents.

Limitations on Permit Coverage

Comment 403:

TCCOS and Mathews & Freeland comment that the permit does not authorize discharges that occur after the construction site has undergone final stabilization. Thus, it effectively removes post-construction discharges from coverage under the permit. TCCOS and Mathews & Freeland do not believe that was the intent and suggest removing this subsection from the permit.

Response 403:

Part VI.C. was deleted in the re-noticed permit and the remaining sections renumbered accordingly.

Numeric Effluent Limitations

Comment 404:

Houston requests clarification regarding numeric effluent limitations affecting concrete batch plants. Houston assumes these provisions are limited to storm water runoff from concrete batch plants owned or operated by the MS4 operator or by a construction contractor working on behalf of the MS4 operator. Houston also assumes that TCEQ is not requiring MS4 operators to monitor storm water runoff from all concrete batch plants that discharge to their MS4s. Austin requests that the requirement include a statement that associates the batch plant with a construction site or construction activities. Cleburne suggests incorporating the following change for clarity: "All discharges of storm water runoff from concrete batch plants associated with a construction project authorized under the MS4 TPDES General Permit must be monitored at the following monitoring frequency and comply with the following numeric effluent limitations . . .."

Response 404:

The information contained in this part of the permit applies only to those construction activities that an MS4 operator is seeking authorization for under this permit and where the MS4 operator is the construction site operator. Thus, TCEQ is not requiring MS4 operators to monitor storm water runoff from all concrete batch plants that discharge to their MS4s. In order to provide additional clarity, the first sentence in Part VI.D. was revised in the re-noticed permit to: "All discharges of storm water runoff from concrete batch plants must be monitored at the following monitoring frequency and comply with the following numeric effluent limitations . . .."

Storm Water Pollution Prevention Plan (SWP3)

Comment 405:

Cleburne comments that Part VI.E.3. is repetitive and suggests the following editorial changes for clarity in Part VI.E.1.: *1. develop a SWP3 according to the provisions of this general permit that covers the entire site and begin implementation of that plan prior to commencing construction activities* . . .. Tarrant County also recommends deleting item three because it is already stated in item one.

Response 405:

Part VI.E.3. was deleted from the re-noticed permit and Part VI.E.1. was changed to: "develop a SWP3 according to the provisions of this general permit that covers the entire site and begin implementation of that plan prior to commencing construction activities . . .."

Comment 406:

NCTCOG and Farmers Branch request revising the permit language in Part VI.E.5. for clerical reasons from "are aware that municipal personnel that are responsible" to "are aware that municipal personnel are responsible."

Response 406:

Part VI.E.5. was revised in the re-noticed permit to: "ensure that the SWP3 identifies the municipal personnel responsible for implementation of control measures described in the plan . . .."

Deadlines for SWP3 Preparation and Compliance

Comment 407:

NCTCOG and Farmers Branch request changing the word "operators" in Part VI.G.2. to "contractors" because the MS4 is the sole operator under this permit.

Response 407:

The word "operators" was changed to "contractors" in Part VI.G.2. of the re-noticed permit.

Contents of SWP3

Comment 408:

Cleburne comments that the request in Part VI.J.1.(d) to provide "the quality of any discharge from the site" is vague and asks how the MS4 operator is to determine the quality of the discharge. Cleburne believes that describing the quality of a discharge can be very subjective and asks whether the requirement refers to the quality of the discharge before, during, or after construction. Cleburne also asks whether this refers to storm water runoff and, if so, how this is determined prior to construction activities when the SWP3 is being prepared.

Response 408:

The re-noticed permit was changed to remove requiring an estimate of the runoff coefficient and Part VI.J.1.(d) was changed to: *(d) data describing the soil type or the quality of any discharge from the site* . . .." The quality requirement refers to discharges of runoff from the site, and information obtained from visual observation or the use of historical knowledge of runoff based on soil type. This MS4 operator may revise this portion of the SWP3 when new information becomes available.

Comment 409:

Austin requests revising the term "alternative sediment controls" in Part VI.J.4.(a) to "equivalent control measure" for consistency with the current EPA Region 6 CGP and states that it also establishes the expectation that the alternative control must provide a level of treatment equal to the temporary sediment basin.

Response 409:

Part VI.J.4.(a) was revised in the re-noticed permit to require "equivalent control measures" instead of "alternative sediment controls."

Comment 410:

NCTCOG and Farmers Branch comment that Part VI.J.5. refers to the submission of an NOT. However, they note that NOTs are not required for municipal construction activities.

Response 410:

The last sentence in Part VI.J.5. was changed in the re-noticed permit to: "Permittees are only responsible for the installation and maintenance of storm water management measures prior to final stabilization of the site."

Comment 411:

Cleburne recommends deleting the language from Part VI.J.9.(b) because it repeats Part VI.J.9.(a).

Response 411:

The re-noticed permit deleted the duplicate requirements in Part VI.J.9.(b) and both provisions were revised for better clarity and meaning. Additionally, an alternative inspection schedule, comparable to requirements in TPDES general permit TXR150000 for construction activities was included in the revision:

(a) Personnel provided by the permittee and familiar with the SWP3 must inspect disturbed areas of the construction site that have not been finally stabilized, areas used for storage of materials that are exposed to precipitation, all structural control measures for effectiveness and necessary maintenance, and locations where vehicles enter or exit the site for evidence of off-site tracking. Inspections must occur at least once every fourteen (14) calender days and within twenty four (24) hours of the end of a storm event of 0.5 inches or greater. As an alternative, the SWP3 may be developed to require that these inspections will occur at least once every seven (7) calender days; in which case additional inspections are not required following each qualifying storm event. If this alternative schedule is developed, the inspection must occur on a specifically defined day, regardless of whether or not there has been a rainfall event since the previous inspection.

Where sites have been finally or temporarily stabilized, where runoff is unlikely due to winter conditions (e.g. site is covered with snow, ice, or frozen ground exists), or during seasonal arid periods in arid areas (areas with an average annual rainfall of 0 to 10 inches) and semi-arid areas (areas with an average annual rainfall of 10 to 20 inches), inspections must be conducted at least once every month.

(b) Personnel provided by the permittee and familiar with the SWP3 must inspect all accessible discharge locations to determine if erosion control measures are effective in preventing visually noticeable changes to receiving waters, including persistent cloudy appearance in water color and noticeable accumulation of sediments.

Where discharge locations are inaccessible, nearby downstream locations must be inspected to the extent that such inspections are practicable. The frequency for these inspections must be established by the permittee in the SWP3 with consideration for local rainfall and soil, but must occur at least once during the construction activity if a discharge occurs.

Fact Sheet - Permit Coverage

Comment 412:

TCCOS and Mathews & Freeland comment that the permit states that TCEQ "may determine that an NOI is complete," while the fact sheet states that TCEQ "shall either confirm coverage or notify the applicant that coverage under the permit is denied."

Response 412:

The fact sheet of the re-noticed permit was changed for consistency with the actual permit language. Part VIII.C. was changed, in part to: "Following review of the NOI, SWMP, and any public comments received on the application, the Executive Director will determine that: 1) the submission is complete and confirm coverage by providing a notification and an authorization number, 2) determine the NOI is incomplete and deny coverage until a complete NOI and SWMP is submitted, or 3) deny coverage and provide a deadline by which the MS4 operator must submit an application for an individual permit."

TRD-200703593
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 14, 2007

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 24, 2007**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commissions jurisdiction, or the commissions orders and permits issued in accordance with the commissions regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 2393400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 24, 2007**. Comments may also be sent by facsimile machine to the attorney at (512) 2393434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Hinas Lodging Company dba Budget Inn Express; DOCKET NUMBER: 2005-1718-PWS-E; TCEQ ID NUMBER: RN101442291; LOCATION: 3933 Highway 90, Columbus, Colorado County, Texas; TYPE OF FACILITY: hotel with a public water supply; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and Texas Health and Safety Code (THSC), §341.033(d), by failing to collect routine water samples for bacteriological analysis and by failing to post a public notice of the failure to conduct sampling for the months of January 2003, and February and May 2005; 30 TAC §290.109(c)(3)(A)(ii) and §290.122(c)(2)(B), by failing to collect and submit repeat water samples within 24 hours of being notified of a total coliform positive sample result in December 2003, and November and December 2004, and by failing to provide public notice of the failure to conduct repeat sampling; and 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(B), by failing to collect and submit the appropriate number of additional routine water samples, the month after the water system had a total coliform positive sample result and by failing to provide public notice of the failure to collect all required samples; PENALTY: $2,840; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(2) COMPANY: Marcos Mariscal; DOCKET NUMBER: 2003-0302-MSW-E; TCEQ ID NUMBER: RN102864790; LOCATION: south side of State Highway 107, Block 193, approximately 0.5 miles east of the intersection of State Highway 107 and Farm-to-Market Road 493 in La Blanca, Hildalgo County, Texas; TYPE OF FACILITY: municipal solid waste disposal site; RULES VIOLATED: 30 TAC §382.60(a), by failing to obtain a scrap tire storage site registration for the facility; and 30 TAC §330.4(a) and §330.5(a), by failing to prevent the collection, storage, and disposal of municipal solid waste at an unauthorized disposal site; PENALTY: $10,500; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(3) COMPANY: Mid-West Feed Yards, Inc.; DOCKET NUMBER: 2004-1637-AGR-E; TCEQ ID NUMBER: RN101519486; LOCATION: 1527 North Bell Street, San Angelo, Tom Green County, Texas; TYPE OF FACILITY: animal feeding operation; RULES VIOLATED: Texas Water Code §26.121(a)(1) and Water Quality Permit No. 01870, by failing to prevent the discharge of waste contaminated stormwater into or adjacent to waters in the State; 30 TAC §§321.38(h), 321.47(d)(2), 321.36(c), 321.36(h)(2), 321.47(e)(6), and 321.43(j)(2)(B), and Section VI, Special Provisions, paragraphs 1, 2 and 4 of the Water Quality Permit No. 01870, by failing to adequately stockpile manure waste stored on-site to prevent contaminated stormwater runoff, by failing to adequately maintain the facility's earthen berms to prevent ponding and puddling of wastewater and to provide adequate drainage to the retention control structure (RCS), by failing to maintain the perimeter control structures and devices, and by failing to adequately maintain and operate the RCS wastewater disposal mechanism; by failing to provide a permanent marker in the RCS, by failing to fully comply with the current regulations and specific technical requirements when operating an animal feeding operation; 30 TAC §321.38(g)(1), (g)(3), and (g)(3)(E), and §321.39(b)(5), and Section VI, Special Provisions, Paragraph 4 of the

Water Quality Permit No. 01870, by failing to provide the required compaction and construction engineering certification on the modifications to the RCS embankments; by failing to submit the required liner certification as proof of no significant hydrolic connection, by failing to have the RCS recertified by a natural resource conservation service or licensed professional engineer within 30 days after the two most recent pond cleaning events conducted on December 30, 2000 and April 19, 2003; 30 TAC §321.36(1), and Section VI, Special Provisions, Paragraph 2 of the Water Quality Permit No. 01870 by failing to remove or properly dispose of dead animals from the site; 30 TAC §321.44(a), and Section V Conditions, Standard Provisions, Subparagraph (b) of the Water Quality Permit No. 01870, by failing to provide written notification to the TCEQ within 14 working days of the February 24, 2004, discharge from the RCS or any component of the waste handling or land application system; and 30 TAC §321.46(d)(9) and §321.36(e)(1), by failing to perform annual nutrient analysis for at least one representative sample of manure/litter for total nitrogen, total phosphorus, and total potassium for the calendar years of 2001, 2002, and 2003, and by failing to maintain the results on-site at the facility; PENALTY: $24,675; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

TRD-200703610
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 14, 2007

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 24, 2007**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 24, 2007**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Anusha, Inc. dba Citgo Food Store; DOCKET NUMBER: 2005-1479-PST-E; TCEQ ID NUMBER: RN102432838; LOCATION: 6000 Antoine Drive, Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §38.815(a) and (b), by failing to provide acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from the operation of petroleum underground storage tanks (USTs); PENALTY: $2,140; STAFF ATTORNEY: Robert Mosley, Litigation Division, MC 175, (512) 239-0627; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(2) COMPANY: Datari Corporation dba One Stop Mobil; DOCKET NUMBER: 2003-0389-PST-E; TCEQ ID NUMBER: RN101436038; LOCATION: 4024 Nasa Road 1, El Lago, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; PENALTY: $3,150; STAFF ATTORNEY: Becky Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(3) COMPANY: Dosan Enterprises, Inc. dba Professional Cleaners; DOCKET NUMBER: 2006-1409-DCL-E; TCEQ ID NUMBER: RN104996285; LOCATION: 5035 A Farm-to-Market Road 2920, Spring, Harris County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULES VIOLATED: 30 TAC §337.10(a) and Texas Health and Safety Code, §374.102, by failing to complete and submit the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: Mark Squires dba Royal Landscapes; DOCKET NUMBER: 2006-0985-LII-E; TCEQ ID NUMBER: RN103605911; LOCATION: 2600 Westhollow Drive, No. 1621, Houston, Harris County, Texas; TYPE OF FACILITY: landscaping business; RULES VIOLATED: 30 TAC §30.5(b) and Texas Water Code, §37.003, by failing to refrain from advertising or representing himself to the public as a person who can perform services for which a license or registration is required when not possessing a current license or registration; PENALTY: $263; STAFF ATTORNEY: Mary Hammer, Litigation Division, MC 175, (512) 239-2496; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(5) COMPANY: New York Brothers Investments Inc. dba BKS Beverage; DOCKET NUMBER: 2004-1407-PST-E; TCEQ ID NUMBER: RN101539294; LOCATION: 300 East Moore Avenue, Terrell, Kaufman County, Texas; TYPE OF FACILITY: petroleum storage tank with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum UST; PENALTY: $3,150; STAFF ATTORNEY: James Sallans, Litigation Division, MC 175, (512) 239-

2053; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200703622
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 15, 2007

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 24, 2007**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 24, 2007**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2006-0093-AIR-E; TCEQ ID NUMBER: RN100825249; LOCATION: 21689 Highway 35, Old Ocean, Brazoria County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §116.715(a); Flexible Air Permit Nos. 22690 and PSD-TX-751M1, Special Condition No. 1; and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent the unauthorized release of air contaminants into the atmosphere; PENALTY: $34,875; Supplemental Environmental Project offset amount of $17,437.50 applied to the Houston-Galveston Area Emission Reduction Credit Organization Clean Cities/Clean Vehicles Program; STAFF ATTORNEY: Justin Lannen, Litigation Division, MC R-4, (817) 588-5927; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(2) COMPANY: Gulf Chemical & Metallurgical Corporation; DOCKET NUMBER: 2006-0583-AIR-E; TCEQ ID NUMBER: RN100210129; LOCATION: 302 Midway Road, Freeport, Brazoria County, Texas; TYPE OF FACILITY: chemicals and metals manufacturing facility; RULES VIOLATED: 30 TAC §116.115(c), new source review (NSR) Air Permit No. 1157C, Special Condition No. 1, and THSC, §382.085(b), by failing to comply with permitted emissions limits. Specifically, NSR Air Permit No. 1157C allows the emission of up to 6.24 pounds per hour (lbs/hr) of ammonia and up to 0.78 lbs/hr of carbon monoxide from the Ammonia Scrubber emission point number (EPN. 006). A stack test performed October 4 - 6, 2005 determined that the emission rates were 50.08 and 0.82 lbs/hr for ammonia and carbon monoxide respectively; 30 TAC §116.115(c), NSR Air Permit No. 1157C, Special Condition No. 1, and THSC, §382.085(b), by failing to comply with permitted emissions limits. Specifically, NSR Air Permit No. 1157C allows the emission of up to 0.05 lbs/hr for volatile organic compounds from the Ammonia Scrubber (EPN 006). A stack test performed on March 21 - 22, 2006 determined that the emissions rate was 3.46 lbs/hr; 30 TAC §116.115(c), NSR Air Permit No. 1157C, Special Condition No. 1, and THSC, §382.085(b), by failing to comply with permitted emissions limits. Specifically, NSR Air Permit No. 1157C allows the emission of up to 0.21 lbs/hr for sulfur dioxide from the Molybdenum Tank (EPN 008). Stack tests performed on October 4 - 6, 2005 and March 21 - 22, 2006 determined that the emission rates were 9.50 lbs/hr and 12.36 lbs/hr respectively; and 30 TAC §116.115(c), NSR Air Permit No. 1157C, Special Condition No. 7.E., and THSC, §382.085(b), by failing to submit a timely report; PENALTY: $154,275; Supplemental Environmental Project offset amount of $77,137 applied to Houston - Galveston Area Emission Reduction Credit Organization; STAFF ATTORNEY: Alfred Oloko, Litigation Division, MC R-12, (713) 422-8918; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(3) COMPANY: Momentum Investment, Inc. dba Angels Gas & Grocery; DOCKET NUMBER: 2004-1701-PST-E; TCEQ ID NUMBER: RN102011566; LOCATION: 2928 North Farm-to-Market Road 565, Mont Belvieu, Chambers County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(III) and (b)(2)(A)(ii), and Texas Water Code (TWC), §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks and associated piping for releases; 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to maintain the Stage II Vapor Recovery System in an operating condition that includes the installation of all components that are part of the approved system; 30 TAC §115.245(1) and (2), and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every twelve months by conducting compliance testing in accordance with the procedure found in the Vapor Recovery Test Procedures Handbook; and 30 TAC §115.246(5) and §334.10(b)(1)(A) and THSC, §382.085(b), by failing to maintain records to demonstrate compliance with applicable requirements; PENALTY: $15,950; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200703609
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 14, 2007

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission

may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 24, 2007**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 24, 2007**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2006-0675-AIR-E; TCEQ ID NUMBER: RN100825249; LOCATION: 21689 Highway 35, Old Ocean, Brazoria County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §117.520(c)(2)(A)(i)(II), and Texas Health and Safety Code, §382.085(b), by failing to complete continuous emission monitoring systems required testing and report submission within 60 days after startup of Cracking Furnace 5 (EPN 22-36-5); PENALTY: $3,700; STAFF ATTORNEY: Justin Lannen, Litigation Division, MC R-4, (817) 588-5927; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(2) COMPANY: Positive Impact Waste Solutions, LLC dba Positive Impact Waste Solutions; DOCKET NUMBER: 2005-0329-MSW-E; TCEQ ID NUMBER: RN102947280; LOCATION: 601 South Pagewood, Odessa, Ector County, Texas; TYPE OF FACILITY: medical waste transportation and an on-site medical waste treatment operation; RULES VIOLATED: 30 TAC §§330.4(a),(b), 330.5(a), 330.1005(n), and 330.1010(a), by failing to deposit shipments of untreated special waste only at a facility which has been permitted by the commission to accept untreated special waste from health care facilities; and by failing to obtain authorization to treat special waste off the site of generation; 30 TAC §330.1005(1)(5), by failing to include in the waste shipping document, the date and place where the untreated special waste from health care related facilities was deposited and unloaded; 30 TAC §330.1005(o), by failing to prevent the acceptance of untreated medical waste which is not properly labeled; 30 TAC §330.1005(k), by failing to furnish the generator with a signed receipt for each shipment at the time of collection of the waste; 30 TAC §330.1005(g)(2) by failing to have the floor and the sides of the cargo compartment of the transportation vehicle made of an impervious, non-porous material; 30 TAC §330.1005(g)(1)(C), by failing to carry the required spill clean-up equipment and personal protective equipment including, but not limited to, disinfectant, absorbent materials, gloves, coveralls, eye protection, and leak-proof containers or packaging materials; and 30 TAC §330.1005(g)(1)(D), by failing to have the required identification on the two sides and back of the cargo-carrying compartment in letters at least three inches high; PENALTY: $14,100; STAFF ATTORNEY: Shawn Slack, Litigation Division, MC 175, (512) 239-0063; REGIONAL OFFICE: Midland Regional Office, 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

TRD-200703623
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 15, 2007

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 113 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning proposed revisions to 30 TAC Chapter 113, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants, and to the state implementation plan (SIP), under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The proposed rulemaking would revise those sections of Chapter 113 containing the federal Maximum Achievable Control Technology (MACT) standards, which are incorporated by reference, with the latest version of the MACT and add new MACT standards that have been recently promulgated. The MACT standards are technology-based standards specific to various source categories that regulate hazardous air pollutants.

The commission will hold a public hearing on this proposal in Austin on September 18, 2007 at 10:00 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to informally discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services, at (512) 239-0177.

Comments may be submitted to Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments.* File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-012-113-PR. The comment period closes September 24, 2007. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Beryl Thatcher, Air Permits Division, (512) 239-5374.

TRD-200703512
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 10, 2007

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 114

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony concerning proposed revisions to 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement revisions to the Low Income Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) as a result of Senate Bill 12, 80th Legislature, 2007. The revisions would expand vehicle owner financial eligibility to 300% of the federal poverty rate and provide incentives for certain vehicle owners to retire and replace their present vehicles with newer, cleaner running vehicles.

The commission will hold public hearings on this proposal in Houston on September 11, 2007, at 1:30 p.m. at the Houston-Galveston Area Council located at 3555 Timmons Lane, Suite 120; in Arlington on September 11, 2007, at 1:30 p.m. at the North Central Texas Council of Governments located at 616 Six Flags Drive, Centerpoint II, in the Metroplex Conference Room; and in Austin on September 11, 2007 at 9:30 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building F, Room 2210. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearings; however, commission staff will be available to informally discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Lesley Williamson, Office of Legal Services, at (512) 239-2461.

Comments may be submitted to Lesley Williamson, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments.* File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-026-114-EN. The comment period closes September 12, 2007. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Bob Wierzowiecki, Air Quality Planning, (512) 239-1769.

TRD-200703513
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 10, 2007

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 114 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony regarding proposed revisions to 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, §114.622, and to the state implementation plan (SIP), under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The proposed rulemaking would authorize the commission to allow travel on highways and roadways designated by the commission to count towards the requirement that grant-funded vehicles operate at least 75% of the annual miles in the eligible counties; raise the cost-effectiveness criteria from $13,000 per ton of nitrogen oxides reduced to $15,000 per ton; and remove the option that vehicles, equipment, and engines replaced under the program may be removed from the state in lieu of being recycled or scrapped.

Public hearings on this proposal will be held in Austin, Texas, on September 11, 2007, at 11:00 a.m., in Building F, Room 2210, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle; in Houston, Texas, on September 11, 2007, at 3:30 p.m. at the Houston-Galveston Area Council located at 3555 Timmons Lane, Suite 120, Room A; and in Arlington, Texas, on September 11, 2007, at 3:30 p.m. at the North Central Texas Council of Governments at 616 Six Flags Drive, Centerpoint II, in the Metroplex Conference Room. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons planning to attend the hearings, who have special communication or other accommodation needs, should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

Comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at ***http://www5.tceq.state.tx.us/rules/ecomments***. *File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-022-114-EN. The comment period closes September 12, 2007. Copies of the proposed rule can be obtained from the commission's Web site at* ***http://www.tceq.state.tx.us/nav/rules/propose_adopt.html***. *For further information, please contact Donna Huff, Air Quality Division, at (512) 239-6628.*

TRD-200703518
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 10, 2007

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Notice of Water Quality Applications

The following notices were issued during the period of July 26, 2007 through August 9, 2007.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

ADORE LIFE CORPORATION has applied for a renewal of TPDES Permit No. WQ0012839001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gal-

lons per day. The facility is located approximately 400 feet east of U.S. Highway 59 and 1,500 feet south of the U.S. Highway 59 bridge over Wills Creek within the City of Seven Oaks in Polk County, Texas.

EL DORADO UTILITY DISTRICT has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. 11302-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 450,000 gallons per day. The facility is located immediately south of and adjacent to Garners Bayou; approximately 1/2 mile east of Old Humble Road crossing of Garners Bayou and two miles east of U.S. Highway 59 in Harris County, Texas.

CITY OF FORT WORTH, TARRANT REGIONAL WATER DISTRICT, AND TEXAS DEPARTMENT OF TRANSPORTATION which operate the City of Fort Worth Municipal Separate Storm Sewer System (MS4), have applied for a minor amendment of existing TPDES Permit No. WQ0004350000, which authorizes storm water point source discharges to surface water in the state from the City of Fort Worth Municipal Separate Storm Sewer System (MS4). The MS4 is located within the corporate boundary of the City of Forth Worth, in Denton, Tarrant, and Wise Counties, Texas. Discharge is via the MS4 to various ditches and tributaries that eventually reach West Fork Trinity River Below Lake Worth, Lake Worth, Trinity River Below Eagle Mountain Reservoir, Eagle Mountain Reservoir, Grapevine Lake, Lake Arlington, Clear Fork Trinity River Below Benbrook Lake, Benbrook Lake, and Lower West Fork Trinity River, in Segment Nos. 0806, 0807, 0808, 0809, 0826, 0828, 0829, 0830, and 0841 of the Trinity River Basin.

THE CITY OF GALVESTON has applied for a major amendment to TPDES Permit No. 10688-005 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 500,000 gallons per day to an annual average flow not to exceed 1,000,000 gallons per day. The facility is located approximately 4.5 miles north of the San Luis Bridge and 1,900 feet west of the San Luis Pass Road (Farm-to-Market Road 3005) in Galveston County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

H BOWERS, INC. which proposes to operate a shrimp and catfish processing facility, has applied for a new permit, Proposed Permit No. WQ0004815000 to authorize the disposal of process wastewater from a fish and shrimp processing facility at a daily average flow not to exceed 102,740 gallons per day via irrigation of 36.5 acres of Coastal Bermuda and Rye grasses. The application rate shall not exceed 3.2 acre-inches/acre-irrigated/month. This permit will not authorize a discharge of pollutants into water in the State.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 127 has applied for a renewal of TPDES Permit No. WQ0012209001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,150,000 gallons per day. The facility is located at 19201 Gummert Road, approximately 1.2 miles west of the intersection of Barker-Cypress Road and Gummert Road in Harris County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 304 has applied for a renewal of TPDES Permit No. WQ0013564001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 650,000 gallons per day. The facility is located 2.0 miles southeast of the intersection of Stuebner-Airline Road and Farm-to-Market Road 1960 in Harris County, Texas.

CITY OF HOUSTON has applied for a renewal of TPDES Permit No. WQ0010495119, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 23,100,000 gallons per day. The facility is located on the southeast side of U.S. Highway 59 South and 0.5 mile south of Bissonett Road, between White Chapel Lane and Keegans Bayou in Harris County, Texas.

JOHN DAVID HAGERMAN AND MARTHA VOSS BYRD has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014800001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day. The facility will be located approximately 2.4 miles north of Farm to Market Road 1488 and 1.8 miles west of Honea Egypt Road near the City of Magnolia in Montgomery County, Texas.

LCS CORRECTIONS SERVICES, INC. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014802001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The facility will be located at 4909 Farm-to-Market Road 2826, approximately 470 feet west of the centerline of County Road 81 in the southwest quadrant of the intersection of County Road 81 and Farm-to-Market Road 2826, southwest of the City of Robstown in Nueces County, Texas.

SOUTH COAST TERMINALS, LP. operates the Manchester Facility, a bulk liquid storage and blending facility for lubricating oils, additives, and specialty chemicals, has applied for a renewal of TPDES Permit No. WQ0003133000, which authorizes the discharge of storm water, wash water from external surface wash down of tanks and diked tank areas, and boiler blowdown on an intermittent and flow variable basis via Outfall 001. The facility is located at 9317 East Avenue S, approximately one-mile north of the intersection of State Highway 225 and Loop 610, in the City of Houston, Harris County, Texas.

SOUTH COAST TERMINALS, LP which operates a bulk liquid storage and blending facility, has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0003965000 to authorize the discharge of storm water associated with industrial activity on an intermittent and flow variable basis via Outfall 001. The facility is located at 9317 East Avenue S, in the City of Houston, Harris County, Texas.

TEJAS MINISTRIES, INC. has applied for a new permit, Proposed Permit No. WQ0014773001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 24,000 gallons per day via surface irrigation of 12.24 acres of a non-public access meadow. The draft permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 16,800 gallons per day via surface irrigation of 12.24 acres of a non-public access meadow. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site will be located 2.1 miles southwest of the intersection of County Road 220 and U.S. Highway 77, south of Giddings and on County Road 219 in Lee County, Texas.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ

can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200703627
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 15, 2007

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Notice of Water Rights Application

Notices issued August 14, 2007.

APPLICATION NO. 18-2003C; Wheatcraft, Inc., 6133 Highway 27, Center Point, Texas 78010, Applicant has applied for an amendment to Certificate of Adjudication No. 18-2003 to divert and use an additional 100 acre-feet of contract water per year from the Guadalupe River, Guadalupe River Basin for agricultural (irrigation) and mining purposes in Kerr County based on an Upstream Diversion Contract with the Guadalupe-Blanco River Authority. The application and partial fees were received on February 20, 2007. Additional information and fees were received on April 30, 2007 and July 6, 2007. The application was accepted for filing and declared administratively complete on July 11, 2007. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12202; Saddle Creek Development, Ltd. 751 Hwy 287 N Suite 104, Mansfield, TX 76063, Applicant, has applied for a Water Use Permit to maintain an existing dam and reservoir on Brown Branch, Trinity River Basin for in-place recreational use in Parker County. The reservoir will be kept at a constant level by use of an existing groundwater well. Fees and partial information were received on January 23, 2007. The application and additional information was received on March 28, 2007 and April 4, 2007. The application was accepted for filing and declared administratively complete on May 15, 2007. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement ([I/we] request a contested case hearing; and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200703626
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 15, 2007

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Proposal for Decision

The State Office of Administrative Hearings (SOAH) issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality (TCEQ) on August 3, 2007 in the matter of the Executive Director of the TCEQ, Petitioner v. Sam R. Dillon dba Sam's Produce Farm; SOAH Docket No. 582-07-1206; TCEQ Docket No. 2004-0639-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Sam R. Dillon dba Sam's Produce Farm on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Paul Munguía, Office of the Chief Clerk, (512) 239-3300.

TRD-200703629
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 15, 2007

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Proposal for Decision

The State Office of Administrative Hearings (SOAH) issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality (TCEQ) on August 2, 2007, in the matter of the Executive Director of the TCEQ, Petitioner v. Hamsho, Inc.; SOAH Docket No. 582-06-2964; TCEQ Docket No. 2005-1287-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Hamsho, Inc. on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Paul Munguía, Office of the Chief Clerk, (512) 239-3300.

TRD-200703630
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 15, 2007

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800 or (800) 325-8506.

Deadline: Semiannual Report for Candidates and Officeholders Due January 16, 2007

Michael Esparza, 813 Parr Dr., Alice, Texas 78332-3670 ($10,000)

Deadline: Semiannual Report for Committees due January 16, 2007

Deadline: 30-Day Pre-Election Report Due April 12, 2007

Martha Failing, Harris County Lawyers Association Inc., 1 Pinedale St., Houston, Texas 77006 ($500)

Deadline: 8-Day Pre-Election Report Due May 4, 2007

Martha Failing, Harris County Lawyers Association Inc., 1 Pinedale St., Houston, Texas 77006 ($2,200)

Deadline: Lobby Activities Report due January 10, 2007

Douglas Dunsavage, American Heart Assn., 1615 Stemmons Fwy, Dallas, Texas 75207-3411

Deadline: Lobby Activities Report due May 10, 2007

Thomas Rene Aguillon, 1900 Blue Crest Lane, San Antonio, Texas 78246

Deece Eckstein, 815 Brazos St., Ste. 204, Austin, Texas 78701

Anthony Haley, 919 Congress Ave., Ste. 1130, Austin, Texas 78701-2157

Deadline: Lobby Activities Report due June 11, 2007

Lisa Barsumian, 1946 S. IH-35, Ste. 400, Austin, Texas 78704-3698

Jim Warren, 710 W. 30th St., Austin, TX 78705-2206

Deadline: Personal Financial Statement due June 7, 2007

Richard D. Smith, 601 W. 12th St., Clarksville, Texas 75426

Deadline: Personal Financial Statement due April 30, 2007

Larry Robert Leibrock, 16457 Lake Loop, Austin, Texas 78734-2629

Charles R. Ramsay, P.O. Box 2319, San Marcos, Texas 78667-2319

Troy Simmons, DDS, 503 North 6th, Longview, Texas 75601

Marcellus A. Taylor, 837 Winchester Dr., Lewisville, Texas 75056

Deadline: Personal Financial Statement due May 1, 2006

Hector De Pena, Jr., 4226 Rehfeld Rd., Corpus Christi, Texas 78410-4137

TRD-200703606
David Reisman
Executive Director
Texas Ethics Commission
Filed: August 14, 2007

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State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments

Notice of Public Hearing on Proposed Rule Relating to the Fitting and Dispensing of Hearing Instruments

The State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments will hold a public hearing to accept public comments on the proposed rule in 22 Texas Administrative Code, §141.16, concerning the regulation of Fitters and Dispensers of Hearing Instruments. The rule was published in the June 29, 2007, issue of the *Texas Register* (32 TexReg 3954).

The hearing will be held at 8:30 a.m. on Tuesday, September 11, 2007, at the Department of State Health Services, Moreton Building, Room M-739, 1100 West 49th Street, Austin, Texas.

Additional information may be obtained from Joyce Parsons, Executive Director, Professional Licensing Division, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, telephone (512) 834-6628, extension 6780.

TRD-200703617
Ronald Ensweiler
Chair
State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments
Filed: August 15, 2007

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on September 11, 2007, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rates for five specific medical procedure codes resulting from the 2007 Healthcare Common Procedural Coding System (HCPCS) updates listed below. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rates will be implemented October 17, 2007, but will be retroactively effective January 1, 2007. The proposed rates are as follows:

*Type of Service Code (TOS)	Procedure Code	Current Medicaid Rate	Proposed Medicaid Rate
1	92025	$0.00	$22.09
1	94644	$0.00	$25.64
1	94645	$0.00	$9.82
1	96040	$0.00	$26.73
1	94774	$0.00	$32.46

*Type of Service Code Key: 1 = medical services

Methodology and Justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners, and the specific fee guidelines published in Section 2.2.1.2 of the 2007 Texas Medicaid Provider Procedures Manual. Section 355.8085 requires HHSC to review the fees for individual services at least every two years.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after August 28, 2007. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Required Notice: *The five character codes included in this notice are obtained from the Current Procedural Terminology (CPT®), copyright 2006 by the American Medical Association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of this notice is with HHSC and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in this notice. Fee schedules, relative value units, conversion factors and/or related components are not assigned by the AMA, are not part of CPT, and the AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of this notice should refer to the most recent Current Procedural Terminology, which contains the complete and most current listing of CPT codes and descriptive terms. Applicable FARS/DFARS apply. CPT is a registered trademark of the American Medical Association.*

TRD-200703476
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 9, 2007

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit Amendment 768, Transmittal Number TX 07-009, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective September 1, 2007.

The amendment eliminates the 2.5 percent payment reduction for Medicaid services delivered by professional providers and outpatient facilities that was implemented effective September 1, 2003. The 2.5 percent payment reduction was implemented as a result of the 2004-05 General Appropriations Act (Article II, Special Provisions, Section 28, H.B. 1, 78th Legislature, Regular Session, 2003) and Section 2.03 of H.B. 2292, 78th Texas Legislature, Regular Session, 2003. A 2.5 percent payment reduction factor was applied to Medicaid rates for Medicaid professional services at the end of the claims payment process, as the last step before calculating the actual payment. The elimination of the 2.5 percent payment reduction is a result of increased appropriations under the 2008-09 General Appropriations Act (Article II, Special Provisions, §57(a)(3)(i), H.B. 1, 80th Texas Legislature, Regular Session, 2007).

The amendment adds the reimbursement methodology for personal care services delivered to clients under age 21 delivered by providers other than school districts as fees determined by HHSC. The fees determined by HHSC are based on at least one of the following methods: a review of rates paid to providers delivering similar services, modeling using an analysis of other data available to HHSC such as relevant fee surveys, or a combination of the two. Personal care services delivered under the Consumer Directed Services (CDS) payment option will be reimbursed in accordance with the methodology used for reimbursing CDS providers in the Community-Based Alternatives Waiver, and other Medicaid services overseen by the Texas Department of Aging and Disability Services.

The amendment also revises the reimbursement methodologies for therapies delivered by home health agencies to Medicaid clients under age 21. The revised language reimburses home health agencies based on the lesser of their billed charges for a specific physical, occupational, or speech therapy service or the fee established by HHSC. Fees according to the revised methodology are based on a review of Medicaid and Medicare fees for similar services, an analysis of cost reports provided by home health agencies, modeling using other data available to HHSC such as relevant cost or fee surveys, or a combination thereof.

The proposed amendment is estimated to result in an additional annual aggregate expenditure of $64,996,537 for the remainder of federal fiscal year (FFY) 2007, with approximately $39,504,895 in federal funds and approximately $25,491,642 in state general revenue.

For FFY 2008, the estimated additional aggregate expenditures will be $775,607,779, with approximately $469,708,071 in federal funds and approximately $305,899,708 in state general revenue. For FFY 2009, the estimated additional aggregate expenditures will be $831,602,039, with approximately $502,453,952 in federal funds and approximately $329,148,087 in state general revenue.

Interested parties may obtain copies of the proposed amendment or submit written comments by contacting Nancy Kimble, Senior Rate Analyst, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1363; by facsimile at (512) 491-1998; or by e-mail at nancy.kimble@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200703631
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 15, 2007

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Amendment 777, Transmittal Number TX 07-018, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective September 1, 2007.

The amendment eliminates the 2.5 percent Medicaid payment reduction for Medicaid services delivered by providers of in-home total parenteral hyperalimentation services that was implemented effective September 1, 2003. The 2.5 percent payment reduction was implemented as a result of the 2004-05 General Appropriations Act (Article II, Special Provisions, Section 28, H.B. 1, 78th Legislature, Regular Session, 2003) and Section 2.03 of H.B. 2292, 78th Texas Legislature, Regular Session, 2003. A 2.5 percent reduction factor was applied to Medicaid rates for Medicaid professional and outpatient facility services at the end of the claims payment process, as the last step before calculating the actual payment. The elimination of the 2.5 percent payment reduction is a result of increased appropriations under the 2008-09 General Appropriations Act (Article II, Special Provisions, Section 57(a)(3)(i), H.B. 1, 80th Texas Legislature, Regular Session, 2007). The amendment also removes other language that is inapplicable to this provision of the state plan.

The proposed amendment is estimated to result in additional annual aggregate expenditure of $4,476 for the remainder of federal fiscal year (FFY) 2007, with approximately $2,721 in federal funds and $1,755 in state general revenue funds. For FFY 2008, the estimated additional annual aggregate expenditure is $56,913, with approximately $34,467 in federal funds and $22,446 in state general revenue funds. For FFY 2009, the estimated additional annual aggregate expenditure is $61,237, with approximately $36,999 in federal funds, and $24,238 in state general revenue funds.

Interested parties may obtain copies of the proposed amendment or submit written comments by contacting Eileen Kreh, Rate Analyst, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-600, Austin, Texas 78708-5200; by telephone at (512) 491-1347; by facsimile at (512) 491-1998; or by e-mail at Eileen.Kreh@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200703521
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 10, 2007

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Amendment 778, Transmittal Number TX 07-019 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective September 1, 2007.

The amendment eliminates the 2.5 percent Medicaid payment reduction for Medicaid services delivered by respiratory care services providers that was implemented effective September 1, 2003. The 2.5 percent payment reduction was implemented as a result of the 2004-05 General Appropriations Act (Article II, Special Provisions, Section 28, H.B. 1, 78th Legislature, Regular Session, 2003) and Section 2.03 of H.B. 2292, 78th Texas Legislature, Regular Session, 2003. A 2.5 percent payment reduction factor was applied to Medicaid rates for Medicaid professional and outpatient facility services at the end of the claims payment process, as the last step before calculation of the actual payment. The elimination of the 2.5 percent payment reduction is the result of increased appropriations under the 2008-09 General Appropriations Act (Article II, Special Provisions, Section 57(a)(3)(i), H.B. 1, 80th Texas Legislature, Regular Session, 2007).

The proposed amendment is estimated to result in additional annual aggregate spending for federal fiscal year (FFY) 2007 of $3, of which $2 is federal expenditures and $1 is state general revenue expenditures. For FFY 2008, the estimated additional annual aggregate spending is $41, with $25 in federal expenditures and $16 in state general revenue expenditures. For FFY 2009, the estimated additional annual aggregate spending is $44, with $27 in federal expenditures and $17 in state general revenue expenditures.

Interested parties may obtain copies of the proposed amendment or submit written comments by contacting Eileen Kreh, Rate Analyst, by mail at Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1347; by facsimile at (512) 491-1998; or by e-mail at eileen.kreh@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200703612
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 13, 2007

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 07-022, Amendment Number 781, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective September 1, 2007.

The purpose of this amendment is to expand Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services to include personal care services (PCS). In Texas, EPSDT is known as Texas Health Steps (THSteps). PCS will be a benefit available in a client's home or other

community setting when the services are provided through a Medicaid-enrolled organization licensed to provide personal care services or a Medicaid-enrolled organization meeting State contract requirements as a consumer directed services agency.

The proposed amendment is estimated to result in additional annual aggregate expenditures of $815,556 for the remainder of federal fiscal year (FFY) 2007 (September 1, 2007, to September 30, 2007), with $495,695 in federal expenditures and $319,861 in state general revenue expenditures. For FFY 2008, the estimated annual aggregate expenditure is $9,786,672, with $5,926,809 in federal expenditures and $3,859,863 in state general revenue expenditures. For FFY 2009, the estimated additional annual aggregate expenditure is $10,011,512, with $6,048,956 in federal expenditures and $3,962,556 in state general revenue expenditures.

Interested parties may obtain copies of the proposed amendment by contacting Barbara Davenport, Policy Analyst, by mail at Policy Development Support, Medicaid and CHIP Division, Texas Health and Human Services Commission, P.O. Box 85200, H-600, Austin, Texas 78708-5200; by telephone at (512) 491-1104; by facsimile at (512) 491-1953; or by e-mail at Barbara.Davenport@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200703638
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 15, 2007

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Amendment 784, Transmittal Number TX 07-025, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective September 1, 2007.

The amendment eliminates the 2.5 percent payment reduction for Medicaid vision and hearing services that was implemented September 1, 2003. The 2.5 percent payment reduction was implemented as a result of the 2004-2005 General Appropriations Act (Article II, Special Provisions, Section 28, House Bill 1, 78th Legislature, Regular Session, 2003) and Section 2.03 of House Bill 2292, 78th Texas Legislature, Regular Session, 2003. A 2.5 percent payment reduction factor was applied to Medicaid rates for Medicaid professional services at the end of the claims payment process, as the last step before calculating the actual payment. The elimination of the 2.5 percent payment reduction is a result of increased appropriations under the 2008-2009 General Appropriations Act (Article II, Special Provisions, Section 57(a)(3)(i), House Bill 1, 80th Texas Legislature, Regular Session, 2007).

The proposed amendment is estimated to result in an additional annual aggregate expenditure of $87,565 for the remainder of federal fiscal year (FFY) 2007, with approximately $53,222 is federal funds and approximately $34,343 is state general revenue. For FFY 2008, the estimated additional aggregate expenditure is $1,113,829, with approximately $674,535 is federal funds and approximately $439,294, in state general revenue. For FFY 2009, the estimated additional aggregate expenditure is $1,198,479, with approximately $724,121 in federal funds, and approximately $474,359 in state general revenue.

Interested parties may obtain copies of the proposed amendment or submit written comments by contacting James Hollinger, Rate Analyst, by mail at the Rate Analysis Department, by mail at the Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1175; by facsimile at (512) 491-1998; or by e-mail at james.hollinger@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200703639
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 15, 2007

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit Transmittal Number TX 07-030, Amendment Number 789, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective September 1, 2007.

The purpose of this amendment is to modify the Medicaid reimbursement methodology for tuberculosis (TB) clinics. Current state plan language directs HHSC to reduce TB clinic payments by 2.5 percent. This language has been in place since September 1, 2003, but a corresponding reduction in provider payments was never implemented. The removal of this language assures that our State Plan and our current reimbursement methodology are congruent.

Removal of the current state plan language would not change current reimbursement rates and would have no fiscal impact to state or federal funds since the reduction was never implemented. There will be no increase or decrease in annual aggregate expenditures because of the removal of the provision.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Amber Lovett by mail at Rate Analysis Department, Medicaid/CHIP Division, Texas Health and Human Services Commission, P.O. Box 85200, Mail Code H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1371; by facsimile at (512) 491-1998; or by e-mail at amber.lovett@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of State Health Services.

TRD-200703474
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 9, 2007

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 07-032, Amendment Number 791, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective September 1, 2007.

The Purpose of this amendment is to include outpatient services in the supplemental payment calculation for non-state owned rural public hospitals and change the Medicaid charge deficit criteria from 1% to 0.5% for inpatient services. Outpatient services are being added to the supplemental payment calculation for rural public hospitals since they are part of the Texas Medicaid safety net hospitals. The state feels this additional reimbursement will support these hospitals in their mis-

sion to serve Medicaid recipients. Changing the deficit criteria from 1% to 0.5% allows for an increase in the number of qualified providers who would provide intergovernmental transfers (IGT) and, therefore, increase the amount of supplemental payments to eligible providers.

The proposed amendment is estimated to result in an additional annual aggregate expenditure of $788,760 for the remainder of federal fiscal year (FFY) 2007, with approximately $479,408 in federal funds and approximately $309,352 in intergovernmental transfers (IGT). For FFY 2008, the estimated additional aggregate expenditures will be $9,465,117, with approximately $5,732,075 in federal funds and approximately $3,733,042 in IGT. For FFY 2009, the estimated additional aggregate expenditures will be $9,465,117, with approximately $5,718,824 in federal funds and approximately $3,746,293 in IGT. These estimated additional annual aggregate expenditures are for both outpatient and inpatient services.

To obtain copies of the proposed amendment, interested parties may contact Lupita Villarreal by mail at Rate Analysis for Hospital services, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1178; by facsimile at (512) 491-1983; or by e-mail at Lupita.villarreal@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200703632
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 15, 2007

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 07-036, Amendment Number 795, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective September 1, 2007 through August 31, 2008.

The proposed amendment will adjust payment rates for the Primary Home Care program to reflect the 2008-2009 General Appropriations Act (Article IX, Section 19.82, House Bill 1, 80th Legislature, Regular Session, 2007), which appropriated general revenue funds for state fiscal year 2008 for provider rate increases for the Primary Home Care Program. The amendment will also revise the plan language relating to Consumer Directed Services to institute a monthly payment to Consumer Directed Services Agencies as per Centers for Medicare and Medicaid Services direction.

The proposed amendment is estimated to result in additional annual aggregate expenditures of $3,084,076 for a portion of federal fiscal year (FFY) 2007 (September 1, 2007, through September 30, 2007), with approximately $1,874,502 in additional costs in federal funds and approximately $1,209,574 of additional costs in state general revenue and additional annual aggregate expenditures of $32,901,660 for FFY 2008, with approximately $19,925,245 of additional costs in federal funds and approximately $12,976,415 of additional costs in state general revenue. There is no fiscal impact for FFY 09 because this rate increase expires on August 31, 2008.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Pam McDonald by mail at Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, Mail Code H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1373; by facsimile at (512) 491-1998; or by e-mail at pam.mcdonald@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200703641
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 15, 2007

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Amendment 796, Transmittal Number TX 07-037, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective September 1, 2007.

The amendment eliminates the 2.5 percent payment reduction for Medicaid services for family planning services that was implemented effective September 1, 2003. The 2.5 percent payment reduction was implemented as a result of the 2004-2005 General Appropriations Act (Article II, Special Provisions, Section 28, House Bill 1, 78th Legislature, Regular Session, 2003) and Section 2.03 of House Bill 2292, 78th Texas Legislature, Regular Session, 2003. A 2.5 percent payment reduction factor was applied to Medicaid rates for Medicaid professional services at the end of the claims payment process, as the last step before calculating the actual payment. The elimination of the 2.5 percent payment reduction is a result of increased appropriations under the 2008-2009 General Appropriations Act (Article II, Special Provisions, Section 57(a)(3)(i), House Bill 1, 80th Texas Legislature, Regular Session, 2007).

The proposed amendment is estimated to result in an additional annual aggregate expenditure of $148,753 for the remainder of federal fiscal year (FFY) 2007, with approximately $90,412 in federal funds and approximately $58,341 in state general revenue. For FFY 2008, the estimated additional aggregate expenditure is $1,892,135, with approximately $1,145,877 in federal funds and approximately $746,258 in state general revenue. For FFY 2009, the estimated additional aggregate expenditure is $2,035,937, with approximately $1,232,964 in federal funds and approximately $802,974 in state general revenue.

Interested parties may obtain copies of the proposed amendment or submit written comments by contacting James Hollinger, Rate Analyst, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1175; by facsimile at (512) 491-1998; or by e-mail at james.hollinger@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200703642
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 15, 2007

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit Amendment 799, Transmittal Number TX 07-040, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective September 1, 2007.

The amendment eliminates the 2.5 percent payment reduction for Medicaid services delivered by providers of ambulance services that was implemented effective September 1, 2003. The 2.5 percent payment reduction was implemented as a result of the 2004-2005 General Appropriations Act (Article II, Special Provisions, Section 28, House Bill 1, 78th Legislature, Regular Session, 2003) and Section 2.03 of House Bill 2292, 78th Texas Legislature, Regular Session, 2003. A 2.5 percent payment reduction factor was applied to Medicaid rates for Medicaid services at the end of the claims payment process, as the last step before calculating the actual payment. The elimination of the 2.5 percent payment reduction is a result of increased appropriations under the 2008-2009 General Appropriations Act (Article II, Special Provisions, Section 57(a)(3)(i), House Bill 1, 80th Texas Legislature, Regular Session, 2007).

The amendment also changes the Medicaid reimbursement methodology for ambulance services from one based on a reasonable charge methodology to one based on a fee schedule. The amendment specifies that both ground and air ambulance services are to be reimbursed based on the lesser of the provider's billed charges or fees established by HHSC. The fees established by HHSC are based on a review of the Medicare fee schedule and an analysis of other data available to HHSC such as relevant fee surveys.

The proposed amendment is estimated to result in an additional annual aggregate expenditure of $3,377,519 for the remainder of federal fiscal year (FFY) 2007, with approximately $2,052,856 in federal funds and approximately $1,324,663 in state general revenue. For FFY 2008, the estimated additional aggregate expenditure is $40,304,140, with approximately $24,408,187 in federal funds and approximately $15,895,953 in state general revenue. For FFY 2009, the estimated additional aggregate expenditure is $43,213,863, with approximately $26,109,816 in federal funds and approximately $17,104,047 in state general revenue.

Interested parties may obtain copies of the proposed amendment or submit written comments by contacting Nancy Kimble, Senior Rate Analyst, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1363; by facsimile at (512) 491-1998; or by e-mail at nancy.kimble@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200703640
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 15, 2007

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Texas Department of Housing and Community Affairs

HOME Investment Partnerships Program CHDO Notice of Funding Availability

Community Housing Development Organization (CHDO)

Rental Housing Development Program

Notice of Funding Availability (NOFA)

1) Summary

a) The Texas Department of Housing and Community Affairs ("the Department") announces the availability of approximately $6,000,000 in funding from the HOME Investment Partnerships Program for Community Housing Development Organizations (CHDO) to develop affordable rental housing for low-income Texans. The availability and use of these funds is subject to the State HOME Rules at Title 10 Texas Administrative Code (10 TAC) Chapter 53 ("HOME Rules") in effect at the time the application is submitted, the Federal HOME regulations governing the HOME program (24 CFR Part 92), and Chapter 2306, Texas Government Code. Other Federal regulations may also apply such as, but not limited to, 24 CFR Parts 50 and 58 for environmental requirements, Davis-Bacon Act for labor standards, 24 CFR 85.36 and 84.42 for conflict of interest and 24 CFR Part 5, Subpart A for fair housing. Applicants are encouraged to familiarize themselves with all of the applicable state and federal rules that govern the program.

2) Allocation of HOME Funds

a) These funds are made available through unawarded and deobligated HOME funds that are set-aside for eligible CHDO rental housing development proposals which involve new construction, rehabilitation, acquisition and rehabilitation of affordable rental housing development activities. All funds released under this NOFA are to be used for the creation of affordable rental housing for low-income Texans earning 80 percent or less of the Area Median Family Income (AMFI).

b) A rental application may be submitted in a PJ if the HOME units requested are serving persons with disabilities; however the submission will not be processed, reviewed or potentially recommended to the Board unless there is a balance of uncommitted funds available from the 5% PJ funds.

c) In accordance with 10 TAC 53.58, this NOFA will be an Open Application Cycle and funding will be available on a first-come, first-served Statewide basis. Applications will be accepted until 5:00 p.m. June 2, 2008 unless all funds are committed prior to this date. Applicants are encouraged to review the application process cited above and described herein. Applications that do not meet minimum threshold and financial feasibility will not be considered for funding.

d) The Department awards HOME funds, typically as a loan, to eligible recipients for the provision of housing for low, very low and extremely low-income individuals and families, pursuant to 10 TAC 53.54(2). Award amounts are limited to no more than $3 million per development. The minimum HOME award may not be less than $1,000 per HOME assisted unit. The maximum award may not exceed 90% of the total development costs. The remaining 10% of total development cost must be in the form of loans or grants from private or public entities. The per-unit subsidy may not exceed the per-unit dollar limits established by the United States Department of Housing and Urban Development (HUD) under §221(d)(3) of the National Housing Act which are applicable to the area in which the development is located, and as published by HUD. The Department's underwriting guidelines in 10 TAC 1.32 will be used which set as a minimum feasibility a 1.15 debt coverage ratio. Where the anticipated debt coverage ratio in the year after completion exceeds 1.35, a loan or partial loan will be recommended.

e) Each CHDO that is awarded Rental Development funds may also be eligible to receive a grant for CHDO Operating Expenses. Applicants will be required to submit organizational operating budgets, audits and other financial and non-financial materials detailed in the HOME application. The award amount for CHDO Operating Expenses shall not exceed $50,000. Awards for operating expenses will be drawn over a two-year period of time. The Department reserves the right to limit an Applicant to receive not more than one award of CHDO Operating Expenses during the same fiscal year and to further limit the award of CHDO Operating Expenses.

f) Developments involving rehabilitation must establish that the rehabilitation will substantially improve the condition of the housing and will involve at least $12,000 per unit in direct hard costs, unless the

property is also being financed by the United States Department of Agriculture's Rural Development program. When HOME funds are used for a rehabilitation development the entire unit must be brought up to the applicable property standards, pursuant to 24 CFR 92.251(a)(1).

3) Eligible and Ineligible Activities

a) Eligible activities will include those permissible under the federal HOME Rule at 24 CFR 92.205, the State HOME Rules at 10 TAC 53.53(g), which involve only the acquisition, rehabilitation and construction of affordable rental developments.

b) Prohibited activities include those under federal HOME rules at 24 CFR 92.214 and 10 TAC 53.56.

c) Rental development funds will not be eligible for use in a Participating Jurisdiction (PJ).

d) Refinancing of federally financed properties or use of HOME funds for properties constructed within five years of the submission of an Application for assistance will not be permissible.

4) Eligible and Ineligible Applicants

a) The Department provides HOME CHDO funding to qualified nonprofit organizations eligible for CHDO certification. CHDO Certification will be awarded in accordance with the rules and procedures as set forth in the HOME rules at 10 TAC 53.63, Community Housing Development Organization (CHDO) Certification. A separate application process is required for CHDO Certification. Review and approval of the CHDO Certification occurs during the threshold review process, however Applicants will not receive a formal certification until the award of the HOME funds has been approved by the Department's Board. The CHDO Application package will be available with all other application materials on the Department's website. A new Application for CHDO certification must be submitted to the Department with each new Application for HOME Development funds under the CHDO set aside.

b) CHDO Applicants must be the Sponsor, Owner or Developer of the proposed Development. Applicants who apply through a Limited Partnership will be required to provide evidence, at the time of CHDO certification and commitment, that the CHDO Applicant is the Managing General Partner of the partnership and has effective control (decision making authority) over the development and management of the property, pursuant to 24 CFR 92.300.

c) Applicants may be ineligible for funding if they meet any of the criteria listed in 10 TAC 53.53(b), the Department's HOME rule, clarification for 10 TAC 53.53(b)(6) creates ineligibility with any requirements under 10 TAC 49.5(a) of this title excluding 10 TAC 53.53 (b)(5) - 10 TAC 53.53 (b)(8). Applicants are encouraged to familiarize themselves with the Department's certification and debarment policies prior to application submission.

5) Matching Funds

a) Applicants will be required to submit documentation on all financial resources to be used in the development that may be considered match to the Department's federal HOME requirements. Applicants must provide firm commitments as defined in accordance with the Federal HOME rules at 24 CFR 92.218 and the Department's Match Guide and will be provided with the appropriate forms and instructions on how to report eligible match.

6) Affordability Requirements

a) Applicants should be aware that there are minimum affordability standards necessary for HOME assisted rental developments. Initial occupancy income restrictions require that at least 90% of the units are affordable to persons below 60% AMFI and that 20% of the units are affordable to person below 50% AMFI. Over the remaining affordability period at least 20% of HOME assisted units should be affordable to persons earning 50% or less than the AMFI, all remaining units must be affordable to persons earning 80% or less than the AMFI.

b) Each development will have a two-tier affordability term.

i) The first tier will entail the federally required affordability term. For new construction or acquisition of new housing, this term is 20 years. For rehabilitation or acquisition of existing housing, the term is 5 years if the HOME investment is less than $15,000 per unit; 10 years if the HOME investment is $15,000 to $40,000 per unit; and 15 years if the HOME investment is greater than $40,000 per unit. This first tier is subject to all federal laws and regulations regarding HOME requirements, recapture, net proceeds and affordability.

ii) The second tier of affordability is the additional number of years required to bring the total term of affordability up to 30 years or the term of the loan agreement. For example, the second tier of affordability on a 10-year federal affordability term is 20 additional years. The second tier, or remaining term, is subject only to state regulations and affordability requirements.

c) Properties will be restricted under a Land Use Restriction Agreement ("LURA"), or other such instrument as determined by the Department for these terms. Among other restrictions, the LURA may require the owner of the property to continue to accept subsidies which may be offered by the federal government, prohibit the owner from exercising an option to prepay a federally insured loan, impose tenant income-based occupancy and rental restrictions, or impose any of these and other restrictions as deemed necessary at the sole discretion of the Department in order to preserve the property as affordable housing on a case-by-case basis.

7) Site and Development Restrictions

a) Pursuant to 24 CFR 92.251, housing that is constructed or rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances at the time of project completion. In the absence of a local code for new construction or rehabilitation, HOME-assisted new construction or rehabilitation must meet, as applicable, one of three model codes: Uniform Building Code (ICBO), National Building Code (BOCA), Standard (Southern) Building Code (SBCCI); or the Council of American Building Officials (CABO) one or two family code; or the Minimum Property Standards (MPS) in 24 CFR 200.925 or 24 CFR 200.926d. To avoid duplicative inspections when Federal Housing Administration (FHA) financing is involved in a HOME-assisted property, a participating jurisdiction may rely on a Minimum Property Standards (MPS) inspection performed by a qualified person. Newly constructed housing must meet the current edition of the Model Energy Code published by the Council of American Building Officials.

b) All other HOME-assisted housing (e.g., acquisition) must meet all applicable State and local housing quality standards and code requirements and if there are no such standards or code requirements, the housing must meet the housing quality standards in 24 CFR 982.401. When HOME funds are used for a rehabilitation development the entire unit must be brought up to the applicable property standards, pursuant to 24 CFR 92.251(a)(1).

c) Housing must meet the accessibility requirements at 24 CFR Part 8, which implements Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and covered multifamily dwellings, as defined at 24 CFR 100.201, must also meet the design and construction requirements at 24 CFR 100.205, which implement the Fair Housing Act (42 U.S.C. 3601-3619). Additionally, pursuant to the 2007 Qualified Allocation Plan (QAP),10 TAC 49.9(h)(4)(G), Developments involv-

ing New Construction (excluding New Construction of nonresidential buildings) where some Units are two-stories and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type (i.e. one bedroom, two bedroom, three bedroom) must provide an accessible entry level and all common-use facilities in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. A certification will be required after the Development is completed from an inspector, architect, or accessibility specialist. Any Developments designed as single family structures must also satisfy the requirements of §2306.514, Texas Government Code.

d) All of the 2007 Qualified Allocation Plan and Rules 10 TAC 49.6, excluding subsections (d), (f), (g) and (h) apply.

e) Developments involving new construction will be limited to 252 Units. These maximum Unit limitations also apply to those Developments which involve a combination of rehabilitation and new construction. Developments that consist solely of acquisition/rehabilitation or rehabilitation only may exceed the maximum Unit restrictions. The minimum number of units shall be 4 units, pursuant to 10 TAC 53.53(f).

8) Threshold Criteria

a) Housing units subsidized by HOME funds must be affordable to low, very-low or extremely low-income persons. Mixed Income rental developments may only receive funds for units that meet the HOME program affordability standards. All applications intended to serve persons with disabilities must adhere to the Department's Integrated Housing Rule at 10 TAC 1.15.

b) For funds being used for Rental Housing Developments, the Recipient must establish a reserve account consistent with §2306.186, Texas Government Code, and as further described in 10 TAC 1.37, pursuant to 10 TAC 53.53(i).

c) All applications will be required to meet Section 8 Housing Quality Standards detailed under 24 CFR §982.401, Texas Minimum Construction Standards, as well as the Fair Housing Accessibility Standards and Section 504 of the Rehabilitation Act of 1973. Developments must also meet all local building codes or standards that may apply. If the development is located within a jurisdiction that does not have building codes, developments must meet the most current International Building Code.

d) Pursuant to 10 TAC 53.53(j), Applicants for Rental Development activities will be required to provide written notification to each of the following persons or entities 14 days prior to the submission of any application package. Failure to provide written notifications 14 days prior to the submission of an application package at a minimum will cause an application to be terminated under competitive application cycles. Applicants must provide notifications to:

i) the executive officer and elected members of the governing board of the community where the development will be located. This includes municipal governing boards, city councils, and County governing boards;

ii) all neighborhood organizations whose defined boundaries include the location of the Development;

iii) executive officer and Board President of the school district that covers the location of the Development;

iv) residents of occupied housing units that may be rehabilitated, reconstructed or demolished; and

v) the State Representative and State Senator whose district covers the location of the Development.

vi) the notification letter must include, but not be limited to, the address of the development site, the number of units to be built or rehabilitated, the proposed rent and income levels to be served, and all other details required of the NOFA and Application Manual.

e) The following Threshold Criteria listed in this subsection are mandatory requirements at the time of Application submission unless specifically indicated otherwise:

i) An applicant shall provide certification that no person or entity that would benefit from the award of HOME funds has provided a source of match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith, pursuant to 10 TAC 53.53(k).

ii) All contractors, consulting firms, and Administrators must sign and submit an affidavit with each draw to attest that each request for payment of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions, pursuant to 53.53(l).

iii) To encourage the inclusion of families and individuals with the highest need for affordable housing, applicants must target a minimum of 5% of the total units for individuals or families earning 30% or less of area medium income for the development site.

iv) To encourage the involvement of other public agencies and private entities in affordable housing, applicants must provide a minimum of 10% of the total development cost from other public agencies and/or private entities.

v) To encourage reasonable and cost effective building strategies, applicants must limit development cost per square foot to $70.00 for new construction and $38.00 for rehabilitation. Please note, use normal rounding when performing this calculation. ($69.50 and higher would be rounded up to $70.00, $69.49 and lower would be rounded down to $69.00).

vi) All of the 2007 Qualified Allocation Plan and Rules at 10 TAC 49.9(h), excluding subsections (4)(I), (11), (12) and (15).

vii) An applicant is not eligible to apply for funds or any other assistance from the Department unless audits are current at the time of application or the Audit Certification Form has been submitted to the Department in a satisfactory format on or before the application deadline for funds or other assistance per 10 TAC 1.3(b).

9) Review Process

a) Pursuant to 10 TAC 53.58, each application will be handled on a first-come, first-served basis as further described in this section. Each application will be assigned a "received date" based on the date and time it is physically received by the Department. Then each application will be reviewed on its own merits in three review phases, as applicable. Applications will continue to be prioritized for funding based on their "received date" unless they do not proceed into the next phase(s) of review. Applications proceeding in a timely fashion through a phase will take priority over applications that may have an earlier "received date" but that did not timely complete a phase of review. Applications will be reviewed for Applicant and Activity Eligibility, Threshold Criteria, and Financial Feasibility as described in this NOFA.

b) Pursuant to the QAP 10 TAC 49.5(a)(9) if a submitted Application has an entire Volume of the application missing; has excessive omissions of documentation from the Threshold Criteria or Uniform Application documentation; or is so unclear, disjointed or incomplete that a thorough review cannot reasonably be performed by the Department, as determined by the Department. If an application is determined ineligible pursuant to this section, the Application will be terminated without being processed as an Administrative Deficiency.

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NOTE: This NOFA does not include the text of the various applicable regulatory provisions that may be important to the particular HOME CHDO Rental Housing Development Program. For proper completion of the application, the Department strongly encourages potential **applicants to review all applicable State and Federal regulations.**

TRD-200703637

Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 15, 2007

♦ ♦ ♦

HOME Investment Partnerships Program RHD Notice of Funding Availability

1) Summary

a) The Texas Department of Housing and Community Affairs ("the Department") announces the availability of approximately $10,000,000 in funding from the HOME Investment Partnerships Program for the development of affordable rental housing for low-income Texans. The availability and use of these funds is subject to the State HOME Rules at Title 10 Texas Administrative Code (10 TAC) Chapter 53 ("HOME Rules") in effect at the time application is submitted, the Federal HOME regulations governing the HOME program (24 CFR Part 92), and Chapter 2306, Texas Government Code. Other Federal regulations may also apply such as, but not limited to, 24 CFR Parts 50 and 58 for environmental requirements, Davis-Bacon Act for labor standards, 24 CFR §85.36 and §84.42 for conflict of interest and 24 CFR Part 5, Subpart A for fair housing. Applicants are encouraged to familiarize themselves with all of the applicable state and federal rules that govern the program.

2) Allocation of HOME Funds

a) These funds are made available through unawarded and deobligated HOME funds that are set-aside for rental housing development proposals which involve new construction, rehabilitation, acquisition and rehabilitation of affordable rental housing development activities. All funds released under this NOFA are to be used for the creation of affordable rental housing for low-income Texans earning 80 percent or less of the Area Median Family Income (AMFI).

b) A rental application may be submitted in a PJ if the HOME units requested are serving persons with disabilities; however, the submission will not be processed, reviewed or potentially recommended to the Board unless there are a balance of uncommitted funds available from the 5% PJ funds.

c) In accordance with 10 TAC §53.58, this NOFA will be an Open Application Cycle and funding will be available on a first-come, first-served Statewide basis. Applications will be accepted until 5:00 p.m. June 2, 2008 unless all funds are committed prior to this date. Applicants are encouraged to review the application process cited above and described herein. Applications that do not meet minimum threshold and financial feasibility will not be considered for funding.

d) The Department awards HOME funds, typically as a loan, to eligible recipients for the provision of housing for low, very low and extremely low-income individuals and families, pursuant to 10 TAC §53.54(2). Award amounts are limited to no more than $3 million per development. The minimum HOME award may not be less than $1,000 per HOME assisted unit. The maximum award may not exceed 90% of the total development costs. The remaining 10% of total development cost must be in the form of loans or grants from private or public entities. The per-unit subsidy may not exceed the per-unit dollar limits established by the United States Department of Housing and Urban Development (HUD) under §221(d)(3) of the National Housing Act which are applicable to the area in which the development is located, and as published by HUD. The Department's underwriting guidelines in 10 TAC §1.32 will be used which set as a minimum feasibility a 1.15 debt coverage ratio. Where the anticipated debt coverage ratio in the year

after completion exceeds 1.35, a loan or partial loan will be recommended.

e) Developments involving rehabilitation must establish that the rehabilitation will substantially improve the condition of the housing and will involve at least $12,000 per unit in direct hard costs, unless the property is also being financed by the United States Department of Agriculture's Rural Development program. When HOME funds are used for a rehabilitation development the entire unit must be brought up to the applicable property standards, pursuant to 24 CFR §92.251(a)(1).

3) Eligible and Ineligible Activities

a) Eligible activities will include those permissible under the federal HOME Rule at 24 CFR §92.205, the State HOME Rules at 10 TAC §53.53(g), which involve only the acquisition, rehabilitation and construction of affordable rental developments.

b) Prohibited activities include those under federal HOME rules at 24 CFR 92.214 and 10 TAC §53.56.

c) Rental development funds will not be eligible for use in a Participating Jurisdiction (PJ).

d) Refinancing of federally financed properties or use of HOME funds for properties constructed within five years of the submission of an Application for assistance will not be permissible.

4) Eligible and Ineligible Applicants

a) The Department provides HOME funding to qualified nonprofit organizations, for-profit entities, sole proprietors, public housing authorities and units of general local government.

b) Applicants may be ineligible for funding if they meet any of the criteria listed in 10 TAC §53.53(b) of the Department's HOME rule, clarification for 10 TAC §53.53(b)(6) creates ineligibility with any requirements under 10 TAC §49.5(a) of this title excluding subsections (5) - (8). Applicants are encouraged to familiarize themselves with the Department's certification and debarment policies prior to application submission.

5) Matching Funds

a) Applicants will be required to submit documentation on all financial resources to be used in the development that may be considered match to the Department's federal HOME requirements. Applicants must provide firm commitments as defined in accordance with the Federal HOME rules at 24 CFR §92.218 and the Department's Match Guide and will be provided with the appropriate forms and instructions on how to report eligible match.

6) Affordability Requirements

a) Applicants should be aware that there are minimum affordability standards necessary for HOME assisted rental developments. Initial occupancy income restrictions require that at least 90% of the units are affordable to persons below 60% AMFI and that 20% of the units are affordable to person below 50% AMFI. Over the remaining affordability period at least 20% of HOME assisted units should be affordable to persons earning 50% or less than the AMFI, all remaining units must be affordable to persons earning 80% or less than the AMFI.

Each development will have a two-tier affordability term.

i) The first tier will entail the federally required affordability term. For new construction or acquisition of new housing, this term is 20 years. For rehabilitation or acquisition of existing housing, the term is 5 years if the HOME investment is less than $15,000 per unit; 10 years if the HOME investment is $15,000 to $40,000 per unit; and 15 years if the HOME investment is greater than $40,000 per unit. This first tier is subject to all federal laws and regulations regarding HOME requirements, recapture, net proceeds and affordability.

ii) The second tier of affordability is the additional number of years required to bring the total term of affordability up to 30 years or the term of the loan agreement. For example, the second tier of affordability on a 10-year federal affordability term is 20 additional years. The second tier, or remaining term, is subject only to state regulations and affordability requirements.

c) Properties will be restricted under a Land Use Restriction Agreement ("LURA"), or other such instrument as determined by the Department for these terms. Among other restrictions, the LURA may require the owner of the property to continue to accept subsidies which may be offered by the federal government, prohibit the owner from exercising an option to prepay a federally insured loan, impose tenant income-based occupancy and rental restrictions, or impose any of these and other restrictions as deemed necessary at the sole discretion of the Department in order to preserve the property as affordable housing on a case-by-case basis.

7) Site and Development Restrictions

a) Pursuant to 24 CFR §92.251, housing that is constructed or rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances at the time of project completion. In the absence of a local code for new construction or rehabilitation, HOME-assisted new construction or rehabilitation must meet, as applicable, one of three model codes: Uniform Building Code (ICBO), National Building Code (BOCA), Standard (Southern) Building Code (SBCCI); or the Council of American Building Officials (CABO) one or two family code; or the Minimum Property Standards (MPS) in 24 CFR §200.925 or §200.926d. To avoid duplicative inspections when Federal Housing Administration (FHA) financing is involved in a HOME-assisted property, a participating jurisdiction may rely on a Minimum Property Standards (MPS) inspection performed by a qualified person. Newly constructed housing must meet the current edition of the Model Energy Code published by the Council of American Building Officials.

b) All other HOME-assisted housing (e.g., acquisition) must meet all applicable State and local housing quality standards and code requirements and if there are no such standards or code requirements, the housing must meet the housing quality standards in 24 CFR §982.401. When HOME funds are used for a rehabilitation development the entire unit must be brought up to the applicable property standards, pursuant to 24 CFR §92.251(a)(1).

c) Housing must meet the accessibility requirements at 24 CFR part 8, which implements Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and covered multifamily dwellings, as defined at 24 CFR §100.201, must also meet the design and construction requirements at 24 CFR §100.205, which implement the Fair Housing Act (42 U.S.C. §§3601-3619). Additionally, pursuant to the 2007 Qualified Allocation Plan (QAP), 10 TAC §49.9(h)(4)(G), Developments involving New Construction (excluding New Construction of nonresidential buildings) where some Units are two-stories and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type (i.e. one bedroom, two bedroom, three bedroom) must provide an accessible entry level and all common-use facilities in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. A certification will be required after the Development is completed from an inspector, architect, or accessibility specialist. Any Developments designed as single family structures must also satisfy the requirements of §2306.514, Texas Government Code.

d) All of the 2007 Qualified Allocation Plan and Rules 10 TAC §49.6, excluding subsections (d), (f), (g) and (h) apply.

e) Developments involving new construction will be limited to 252 Units. These maximum Unit limitations also apply to those Developments which involve a combination of rehabilitation and new construction. Developments that consist solely of acquisition/rehabilitation or rehabilitation only may exceed the maximum Unit restrictions. The minimum number of units shall be 4 units, pursuant to 10 TAC §53.53(f).

8) Threshold Criteria

a) Housing units subsidized by HOME funds must be affordable to low, very-low or extremely low-income persons. Mixed Income rental developments may only receive funds for units that meet the HOME program affordability standards. All applications intended to serve persons with disabilities must adhere to the Department's Integrated Housing Rule at 10 TAC §1.15.

b) For funds being used for Rental Housing Developments, the Recipient must establish a reserve account consistent with §2306.186, Texas Government Code, and as further described in 10 TAC §1.37 pursuant to 10 TAC §53.53(i).

c) All applications will be required to meet Section 8 Housing Quality Standards detailed under 24 CFR §982.401, Texas Minimum Construction Standards, as well as the Fair Housing Accessibility Standards and Section 504 of the Rehabilitation Act of 1973. Developments must also meet all local building codes or standards that may apply. If the development is located within a jurisdiction that does not have building codes, developments must meet the most current International Building Code.

d) Pursuant to 10 TAC §53.53(j), Applicants for Rental Development activities will be required to provide written notification to each of the following persons or entities 14 days prior to the submission of any application package. Failure to provide written notifications 14 days prior to the submission of an application package at a minimum will cause an application to be terminated under competitive application cycles. Applicants must provide notifications to:

i) the executive officer and elected members of the governing board of the community where the development will be located. This includes municipal governing boards, city councils, and County governing boards;

ii) all neighborhood organizations whose defined boundaries include the location of the Development;

iii) executive officer and Board President of the school district that covers the location of the Development;

iv) residents of occupied housing units that may be rehabilitated, reconstructed or demolished; and

v) the State Representative and State Senator whose district covers the location of the Development.

vi) the notification letter must include, but not be limited to, the address of the development site, the number of units to be built or rehabilitated, the proposed rent and income levels to be served, and all other details required of the NOFA and Application Manual.

e) The following Threshold Criteria listed in this subsection are mandatory requirements at the time of Application submission unless specifically indicated otherwise:

i) An applicant shall provide certification that no person or entity that would benefit from the award of HOME funds has provided a source of match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith, pursuant to 10 TAC §53.53(k).

ii) All contractors, consulting firms, and Administrators must sign and submit an affidavit with each draw to attest that each request for payment of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions, pursuant to 10 TAC §53.53(l).

iii) To encourage the inclusion of families and individuals with the highest need for affordable housing, applicants must target a minimum of 5% of the total units for individuals or families earning 30% or less of area medium income for the development site.

iv) To encourage the involvement of other public agencies and private entities in affordable housing, applicants must provide a minimum of 10% of the total development cost from other public agencies and/or private entities.

v) To encourage reasonable and cost effective building strategies, applicants must limit development cost per square foot to $70.00 for new construction and $38.00 for rehabilitation. Please note, use normal rounding when performing this calculation. ($69.50 and higher would be rounded up to $70.00, $69.49 and lower would be rounded down to $69.00).

vi) All of the 2007 Qualified Allocation Plan and Rules at 10 TAC §49.9(h), excluding subsections (4)(I), (11), (12) and (15).

vii) An applicant is not eligible to apply for funds or any other assistance from the Department unless audits are current at the time of application or the Audit Certification Form has been submitted to the Department in a satisfactory format on or before the application deadline for funds or other assistance per 10 TAC §1.3(b).

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NOTE: This NOFA does not include the text of the various applicable regulatory provisions that may be important to the particular HOME CHDO Rental Housing Development Program. For proper completion of the application, the Department strongly encourages potential applicants to review all applicable State and Federal regulations.

TRD-200703636
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 15, 2007

♦ ♦ ♦

2007 Texas Veterans Housing Support Program Notice of Funding Availability

Summary

The Texas Department of Housing and Community Affairs (Department) announces the availability of approximately $1,000,000 of the 2007 Housing Trust Fund (HTF) to fund housing programs for veterans. Funds will be made available for tenant based rental assistance and homebuyer assistance. The availability and use of these funds are subject to the State Housing Trust Fund Rules at 10 Texas Administrative Code, Title 10, Part 1, Chapter 51 ("HTF Rules") in effect at the time the application is submitted.

Allocation of HTF Funds

These funds are made available through the Housing Trust Fund and are not subject to the Regional Allocation Formula. All funds released under this NOFA shall be used for the creation of affordable housing for Texas veterans earning 80 percent (80%) or less of the Area Median Family Income (AMFI) as defined by the U. S Department of Housing and Urban Development (HUD), with priority given to veterans with disabilities and/or veterans who have served in the war in Afghanistan, also known as Operation Enduring Freedom, the Iraq War, also know as Operation Iraqi Freedom, and other recent overseas conflicts.

In accordance with 10 TAC §51.6(d), this NOFA will be an Open Application Cycle and funding will be available on a first-come, first-served statewide basis. Applications will be accepted by the Department on regular business days until 5:00 p.m., **Friday, December 28, 2007, regardless of method of delivery.** Applicants are encouraged to review the application process cited above and described herein. Applications that do not meet minimum threshold criteria will not be considered for funding.

The maximum award amount per activity is $250,000 inclusive of project and administrative funds. Up to four percent (4%) of the requested project funds may be requested for administrative costs.

Entities applying for both activities, must submit one application for each activity.

Eligible and Ineligible Activities

Eligible activities will include those permissible under HTF Rules at 10 TAC §51.4.

Prohibited activities include those under HTF Rules 10 TAC §51.5.

Veteran's Rental Assistance (VRA):

Rental subsidy, security, and utility deposit assistance is provided in the form of a grant to tenants in accordance with written tenant selection policies for a period not to exceed 36 months. VRA allows the assisted tenant to move to and live in any dwelling unit with a right to continued assistance during a 36-month period with the condition that the assisted household participate in a self-sufficiency program, which shall include among its objectives the acquisition of a permanent source of affordable housing on or before the expiration of the rental subsidy. The VRA program will be available for veterans transitioning from Veteran's Administration (VA) Hospitals or other care facilities; or veterans honorably discharged from the service and transitioning to civilian life. All rental properties must meet HUD's Housing Quality Standards (HQS).

The contract term for a VRA contract will be 40 months.

Veteran's Homebuyer Assistance (VHA):

Down payment and closing cost assistance is provided to homebuyers for the acquisition, or acquisition and rehabilitation, of affordable and accessible single family housing. Rehabilitation must be to ensure accessibility. Eligible homebuyers may receive loans up to $35,000 for down payment, closing costs and rehabilitation. A maximum of $15,000 of the $35,000 loan can be used for down payment and closing costs. The balance of the assistance can be used for needed accessibility modifications. All homes purchased with HTF assistance must

meet all applicable codes and standards including the Texas Minimum Construction Standards (TMCS).

If the assisted household has an income that is less than 60% of the area median family income or if the head or co-head of the household is an income-qualified (up to 80% AMFI) disabled veteran, the assistance will be in the form of a zero percent (0%) interest 5-year deferred, forgivable loan creating a 2nd or 3rd lien.

If the household income is below 80% of the AMFI, but more than 60% of the AMFI, then the homebuyer assistance will be in the form of a zero percent (0%) interest 10-year deferred, forgivable loan creating a 2nd or 3rd lien.

The VHA loan is to be repaid at the time of resale of the property, refinance of the first lien, repayment of the first lien, or if the unit ceases to be the assisted homebuyer's principal residence. If any of these occur before the end of the 5 or 10-year loan term, the borrower must repay the unforgiven portion of the funds to the Department. This amount will be based on a pro-rata share of the remaining loan term. The amount of assistance for the accessibility modifications will be in the form of a grant. At the completion of the assistance, all properties must meet the TMCS, all applicable building and safety codes, rehabilitation standards, ordinances and local zoning ordinances. If a home is newly constructed it must also meet federal energy requirements as defined by HUD.

The contract term for a VHA contract will be 24 months.

Eligible and Ineligible Applicants

Eligible applicants are Units of General Local Government, Nonprofit Organizations and Public Housing Authorities (PHA's).

Applicants may be ineligible for funding if they meet any of the criteria listed in §51.5 of the Department's HTF Rules.

Threshold Criteria

Veteran's Rental Assistance (VRA):

Cash Reserve:

Each awarded applicant will be required to expend funds according to program guidelines and request funds from the Department for eligible expenses. Every applicant must be able to evidence as a threshold standard that they demonstrate the ability to administer the program and commit adequate cash reserves of at least one month's total rents for the number of households proposed to be served in order to cover any delays in the disbursement process. Cash reserves are not permanently invested in the project but are used for short term deficits that are paid by program funds. This commitment must be included in the applicant's resolution.

Self-Sufficiency Plan: It will also be a threshold requirement that the applicant for rental assistance submit a detailed self-sufficiency plan which must be implemented for each tenant served, if awarded. The Plan must describe the process for the transition of households to permanent housing by the end of the 36-month rental assistance contract term.

The documentation must describe the necessary components for the overall plan proposed for transition of potential tenants. This plan, like a case management plan, should detail the needs of the tenant, how these needs will be addressed including any agreements with service providers who shall assist the tenant at meeting these needs, and a proposed timeframe for completing those activities. The plan must include:

1. A sample household budget which will utilize existing sources of income such as employment, disability payments and other types of support that details how the assisted household will afford to be self-sufficient by the end of the 36 month rental assistance.

2. If additional income is required to attain self-sufficiency, a plan for attaining the required education or training, or a job search plan must be included.

3. Specific housing goals that will be completed on or before the end of the 36 month assistance period. This includes finding subsidized housing, affordable market housing or other permanent housing solutions. The plan should include the required steps such as completing an application, approximate waiting time to get into the type of housing desired and the cost of the housing to the tenant.

Resolution Requirement: All applications submitted for VRA must include an original resolution from the applicant's direct governing body, authorizing the submission of the application, committing a specific amount for cash reserves for use during the contract period and naming a person authorized to represent the organization and signature authority to execute a contract.

Veteran's Homebuyer Assistance (VHA):

Cash Reserve:

Each awarded applicant will be required to expend funds according to program guidelines and request funds from the Department for eligible expenses. Every applicant must be able to evidence as a threshold standard, that they can demonstrate the ability to administer the program and commit adequate cash reserves of at least $35,000 to cover any delays in the disbursement process. Cash reserves are not permanently invested in the project but are used for short term deficits that are paid by program funds. This commitment must be included in the applicant's resolution.

Homebuyer Counseling and Lender Products:

It will also be a threshold requirement that every VHA Applicant provide evidence of Homebuyer Counseling and evidence of available lender products. Evidence must include documentation describing the level of homebuyer counseling proposed for potential homebuyers including a copy of the curriculum, type of materials that will be provided to the homebuyer, a copy of a written agreement with service provider, if the applicant is not the service provider; and a description of post purchase counseling to be provided. The Homebuyer Counseling must be provided to each household served, if awarded.

Applicant is required to submit three letters from lenders interested in participating in the applicant's proposed homebuyer assistance activity. Lender Letters must be on the lender's letterhead and include the lender name, address, city, state, and zip code. Lender letter must affirm the willingness, ability and type of affordable loan products available for the applicant's targeted homebuyers.

Resolution Requirement:

All applications submitted for VHA must include an original resolution from the applicant's direct governing body, authorizing the submission of the application, committing a specific amount for cash reserves for use during the contract period and naming a person authorized to represent the organization and signature authority to execute a contract.

Review Process

Pursuant to 10 TAC §51.6, each application will be handled on a first-come, first-served basis. Each application will be assigned a "received date" based on the date and time it is physically received by the Department. Applications will be reviewed for Applicant and Activity Eligibility and Threshold Criteria as described in this NOFA.

Funding recommendations of eligible applicants will be presented to the Department's Governing Board of Directors based on eligibility and on a first-come, first-served basis limited by the total amount of funds available under this NOFA and the maximum award amount per activity.

Because applications are processed in the order they are received by the Department, it is possible that the Department will expend all available HTF funds before an application has been completely reviewed. If on the date an application is received by the Department, no funds are available under this NOFA, the applicant will be notified that no funds exist under the NOFA and the application will not be processed.

An Applicant may appeal decisions made by staff in accordance with 10 TAC §1.7.

Application Submission

The Application Guide for this NOFA will be available on the Department's website at www.tdhca.state.tx.us on **August 15, 2007,** or you may call (512) 463-8921 to request a copy. Applications must be submitted on forms provided by the Department, and cannot be altered or modified and must be in final form before submitting them to the Department. All applications must be submitted, and provide all documentation, as described in this NOFA and associated application materials. Final application deadline date is **5:00 P.M., Friday, December 28, 2007.**

Applications mailed via the U.S. Postal Service must be mailed to:

Texas Department of Housing & Community Affairs

Attn: Housing Trust Fund, Texas Veterans Housing Support Program

HOME Division

P.O. Box 13941

Austin, Texas 78711-3941

Applications mailed by private carrier or hand-delivered will be received at the physical address:

Texas Department of Housing & Community Affairs

Attn: Housing Trust Fund, Texas Veterans Housing Support Program

HOME Division

221 E. 11th Street

Austin, Texas 78701

Applicants are required to remit a non-refundable application fee payable to the Texas Department of Housing and Community Affairs in the amount of $30 per application. Please send a check, cashier's check, or money order; **do not send cash.** Section 2306.147(b) of the Texas Government Code requires the Department to waive grant application fees for nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services. These organizations must include proof of their exempt status in lieu of the application fee.

Applications that do not meet the filing deadline and application fee requirements will be returned to the applicant and will not be considered for funding. Application deficiencies will be processed in accordance to 10 TAC §51.6. An applicant may appeal decisions made by the Department in accordance with 10 TAC §1.7.

This NOFA does not include text of the various applicable regulatory provisions that may be important to the Housing Trust Fund Program. For proper completion of the application, the Department strongly encourages potential applicants to review the HTF Rules and regulations and to attend an application training workshop.

Application Workshop

The Department will present a Housing Trust Fund Program Application Workshop that will provide an overview of the Housing Trust Fund, application preparation and submission requirements, evaluation criteria, and information about the major State requirements that may affect a Housing Trust Fund project. The Housing Trust Fund Application Workshop schedule and registration will be posted on the Department's website at www.tdhca.state.tx.us.

Audit Requirements

An applicant is not eligible to apply for funds or any other assistance from the Department unless a past audit or Audit Certification Form has been submitted to the Department in a satisfactory format on or before the application deadline for funds or other assistance per 10 TAC §1.3(b). This is a threshold requirement outlined in the application, therefore applications that have outstanding past audits will be disqualified. Staff will not recommend applications for funding to the Department's Governing Board unless all unresolved audit findings, questions or disallowed costs are resolved per 10 TAC §1.3(c).

Contact Information

Questions regarding this NOFA should be addressed to:

HOME Division

221 E. 11th Street

Austin, Texas 78701

Telephone: (512) 463-8921

E-mail: HOME@tdhca.state.tx.us

TRD-200703635
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 15, 2007

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Texas Department of Insurance

Notice of Public Hearing

The Commissioner of Insurance will hold an open meeting under Docket No. 2670 at 9:30 a.m. on September 18, 2007, in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, to consider proposed manual rates for all types and classes of risks written by the Texas Windstorm Insurance Association (TWIA) and submitted by TWIA pursuant to Insurance Code §2210.352.

Copies of the TWIA proposed manual rate filing for both commercial and residential risks are available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, TX 78701 during regular business hours. For further information or to request copies of the filing, please contact Sylvia Gutierrez at (512) 463-6327 (refer to Reference No. P-0807-06).

Written comments on the filing may be submitted to the Office of the Chief Clerk, Texas Department of Insurance, P.O. Box 149104, MC 113-2A, Austin, TX 78714-9104 prior to the hearing on September 18, 2007. An additional copy of the comments must be submitted to J'ne Byckovski, Chief Actuary, P.O. Box 149104, MC 105-5F, Austin, TX 78714-9104. Interested persons may also present written and/or oral comments related to the filing at the open meeting.

This notification is made pursuant to the Insurance Code §2210.352, which requires notification in the Texas Register of the TWIA proposed

manual rates for all types and classes of risks written by the TWIA and exempts the proceeding from Chapter 40 of the Insurance Code and Chapter 2001 of the Government Code.

TRD-200703634
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 15, 2007

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of MH ACQUISITION II, LLC, a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Application of BRENTWOOD SERVICES ADMINISTRATORS, INC., a domestic third party administrator. The home office is BRENTWOOD, TENNESSEE.

Application of NIPUNA SERVICES LIMITED, a foreign third party administrator. The home office is ANDHRA PRADESH, INDIA.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200703624
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 15, 2007

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Texas Lottery Commission

Instant Game Number 842 "Pot O' Gold"

1.0 Name and Style of Game.

A. The name of Instant Game No. 842 is "POT O' GOLD". The play style is "maze coordinate".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 842 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 842.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: A1, A2, A3, A4, A5, A6, B1, B2, B3, B4, B5, B6, C1, C2, C3, C4, C5, C6, D1, D2, D3, D4, D5, D6, E1, E2, E3, E4, E5, E6, F1, F2, F3, F4, F5 and F6.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 842 - 1.2D

PLAY SYMBOL	CAPTION
A1	
A2	
A3	
A4	
A5	
A6	
B1	
B2	
B3	
B4	
B5	
B6	
C1	
C2	
C3	
C4	
C5	
C6	
D1	
D2	
D3	
D4	
D5	
D6	
E1	
E2	
E3	
E4	
E5	
E6	
F1	
F2	
F3	
F4	
F5	
F6	

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 842 - 1.2E

CODE	PRIZE
THR	$3.00
FOR	$4.00
SVN	$7.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $3.00, $4.00, $7.00, $10.00, or $20.00.

H. Mid-Tier Prize - A prize of $30.00, $100 or $300.

I. High-Tier Prize - A prize of $3,000 or $33,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (842), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 842-0000001-001.

L. Pack - A pack of "POT O' GOLD" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "POT O' GOLD" Instant Game No. 842 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "POT O' GOLD" Instant Game is determined once the latex on the ticket is scratched off to expose 48 (forty-eight) Play Symbols. The player will scratch the 12 YOUR LUCKY SPOTS play symbols. The player will then scratch ONLY the 12 corresponding squares in the LUCKY GRID play area. If a player reveals 3 matching play symbols, the player wins prize shown in the LEGEND. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 48 (forty-eight) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 48 (forty-eight) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 48 (forty-eight) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 48 (forty-eight) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The YOUR LUCKY SPOTS play symbols will vary from ticket to ticket.

C. No duplicate YOUR LUCKY SPOTS play symbols on a ticket.

D. No grid will be used consecutively.

2.3 Procedure for Claiming Prizes.

A. To claim a "POT O' GOLD" Instant Game prize of $3.00, $4.00, $7.00, $10.00, $20.00, $30.00, $100 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $30.00, $100 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "POT O' GOLD" Instant Game prize of $3,000 or $33,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "POT O' GOLD" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "POT O' GOLD" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "POT O' GOLD" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 842. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 842 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	725,760	6.94
$4	161,280	31.25
$7	201,600	25.00
$10	161,280	31.25
$20	60,480	83.33
$30	30,240	166.67
$100	8,400	600.00
$300	2,520	2,000.00
$3,000	19	265,263.16
$33,000	11	458,181.82

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.73. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 842 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 842, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200703595
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 14, 2007

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Instant Game Number 1004 "Deal or No Deal"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1004 is "DEAL OR NO DEAL". The play style is "key symbol match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1004 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1004.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: $5.00, $10.00, $15.00, $20.00, $50.00, $100, $250, $500, $1,000, $5,000, $10,000, $50,000, $100,000, $1,000,000 or NO DEAL.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears

under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1004 - 1.2D

PLAY SYMBOL	CAPTION
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$250	TWO FTY
$500	FIV HUND
$1,000	ONE THOU
$5,000	FIV THOU
$10,000	10 THOU
$50,000	50 THOU
$100,000	100 THOU
$1,000,000	1 MLLN
NO DEAL	NO DEAL

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1004 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, $250 or $500.

I. High-Tier Prize - A prize of $1,000, $5,000, $10,000, $50,000, $100,000 or $50,000/yr ($50,000 annually for 20 years).

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (1004), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1004-0000001-001.

L. Pack - A pack of "DEAL OR NO DEAL" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "DEAL OR NO DEAL" Instant Game No. 1004 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "DEAL OR NO DEAL" Instant Game is determined once the latex on the ticket is scratched off to expose 37 (thirty-seven) play symbols. A PLAYER MUST READ THE INSTRUCTIONS BEFORE PLAYING. The player needs to scratch each of the 18 BRIEFCASES play symbols to reveal either a dollar amount or "NO DEAL" play symbol. The player will scratch to eliminate any matching amount or "NO DEAL" play symbol on the PRIZE TABLE. The player must scratch only one "NO DEAL" prize symbol for each "NO DEAL" BRIEFCASE play symbols revealed. If the one remaining square on the PRIZE TABLE is a dollar amount, the player wins that prize. If it's a "NO DEAL" play symbol, play again. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 37 (thirty-seven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 37 (thirty-seven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 37 (thirty-seven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 37 (thirty-seven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate play symbols on a ticket except for the NO DEAL symbol.

C. Every play symbol will appear on non-winning tickets.

D. The NO DEAL play symbol will appear four (4) times on non-winning tickets.

E. The NO DEAL play symbol will appear five (5) times on winning tickets.

F. Top prizes are to be approximately evenly distributed throughout the game.

2.3 Procedure for Claiming Prizes.

A. To claim a "DEAL OR NO DEAL" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100, $250 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, $250 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "DEAL OR NO DEAL" Instant Game prize of $1,000, $5,000, $10,000, $50,000 or $100,000, the claimant must sign the win-

ning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. To claim a "DEAL OR NO DEAL" top level prize of $50,000/YR for 20 years, the claimant must sign the winning ticket and present it at Texas Lottery Commission headquarters in Austin, Texas. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. When claiming a "DEAL OR NO DEAL" Instant Game prize of $50,000 per year for 20 years, the claimant will receive his prize:

1. Annually via direct deposit to the winner's account. With this plan, upon validation of the prize, a payment of $50,000 less any taxes and/or other offsets or mandatory withholdings required by law, will be made once a year on the first business day of the anniversary month of the claim. Annual payments will be made for a period of 20 years or a total of 20 annual to reach the total maximum payment of $1,000,000.

2. If a payment falls on a holiday or weekend, the payment will be made on the following business day

E. As an alternative method of claiming a "DEAL OR NO DEAL" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

F. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

G. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "DEAL OR NO DEAL" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "DEAL OR NO DEAL" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 7,200,000 tickets in the Instant Game No. 1004. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1004 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	960,000	7.50
$10	288,000	25.00
$15	192,000	37.50
$20	216,000	33.33
$50	54,000	133.33
$100	7,500	960.00
$250	3,000	2,400.00
$500	600	12,000.00
$1,000	180	40,000.00
$5,000	50	144,000.00
$10,000	20	360,000.00
$50,000	10	720,000.00
$100,000	6	1,200,000.00
$1,000,000	4	1,800,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.18. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1004 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1004, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200703596
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 14, 2007

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Texas State Board of Pharmacy

Request by Drug Manufacturer for Inclusion of a Drug on List of Narrow Therapeutic Index Drugs

On August 10, 2007, the Texas State Board of Pharmacy received a letter from Roche Laboratories Inc. requesting that CellCept7 be placed into consideration for inclusion on the list of narrow therapeutic index drugs.

This notice is posted in compliance with Senate Bill 625.

TRD-200703605
Gay Dodson, R.Ph.
Executive Director
Texas State Board of Pharmacy
Filed: August 14, 2007

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 3, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Northland Cable Ventures LLC for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 34605 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 34605.

TRD-200703519
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 10, 2007

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 10, 2007, Yipes Enterprise Services, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60376. Applicant intends to reflect a change in ownership/control whereby FLAG Telecom Group Services Limited, Flag Telecom USA Ltd. And Yipes Holdings, Inc., and Merger Subsidiary, merge into Yipes Holdings, Inc.

The Application: Application of Yipes Enterprise Services, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 34621.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 29, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 34621.

TRD-200703620
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 15, 2007

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 9, 2007, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of TelOps International Inc. d/b/a AmTel for a Service Provider Certificate of Operating Authority, Docket Number 34615 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, SDSL, Optical Services, T1-Private Line, Frame Relay, Fractional T1, long distance and wireless services.

Applicant's requested SPCOA geographic area includes the area served by all incumbent local exchange companies throughout the State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 29, 2007. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 34615.

TRD-200703615
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 14, 2007

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on August 3, 2007, for waiver of denial by the Pooling Administrator (PA) of AT&T Texas' request for two growth blocks in the Spring rate center.

Docket Title and Number: Petition of AT&T Texas. for Waiver of Denial of Numbering Resources in the Spring rate center.

The Application: AT&T Texas submitted applications to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the month-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 29, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 34609.

TRD-200703614
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 14, 2007

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Notice of Application to Surrender a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 10, 2007, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of MS Retail Development Corp. to Surrender its Retail Electric Provider (REP) Certification, Docket Number 34620 before the Public Utility Commission of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 31, 2007. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 34620.

TRD-200703619
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 15, 2007

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Public Notice of Workshop

The staff of the Public Utility Commission of Texas (commission) will hold a workshop relating to Advanced Metering Implementation, on Tuesday and Wednesday, September 18 and 19, 2007, at 9:30 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 34610, *Implementation Project Relating to Advanced Metering* has been established for this proceeding.

Ten days prior to the workshop the commission shall make available in Central Records under Project Number 34610 an agenda for the format of the workshop.

Questions concerning the workshop or this notice should be referred to Christine Wright, Retail Market Oversight, Electric Industry Oversight Division, (512) 936-7376. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200703604
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 14, 2007

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School Land Board

Public Hearing Notice

The School Land Board of the State of Texas invites the public to a hearing to be held by its designated representatives to receive public comments regarding the proposed lease of state owned submerged land for the widening of a portion of the Freeport Harbor Ship Channel by Port Freeport pursuant to Texas Water Code §61.116. The hearing will be held on September 12, 2007 at Freeport Community House, 1300 W. 2nd Street, Freeport, Texas commencing at 7:00 p.m. All interested persons are invited to attend the public hearing to express orally, or in writing, their views on the proposed lease. A workshop, with a poster presentation, will precede the hearing and commence at 6:30 p.m. Documents and other information are available for review or study. Please contact Tony Williams at the General Land Office at (512) 463-5055 for the draft environmental impact statement, documents or other information relating to the proposed lease.

TRD-200703633
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
School Land Board
Filed: August 15, 2007

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Texas Department of Transportation

Notice of Intent--United States Highway (US) 290, Travis County, Texas

Pursuant to 43 TAC §2.5(e)(2), the Texas Department of Transportation (department), in cooperation with the Federal Highway Administration, is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed transportation project. The project is United States Highway (US) 290 from State Highway (SH) 130 to Farm-to-Market Road (FM) 973 in Travis County, Texas (project). The project length is approximately 3.2 miles. Areas within the cities of Manor and Austin are included in the study area.

The project is listed in the Capital Area Metropolitan Planning Organization (CAMPO) Mobility 2030 Plan (the long-range transportation plan) as a six-lane tolled freeway. The need for the US 290 project has resulted from rapid population growth in the project area and in surrounding areas in recent years, which is expected to further increase well into the foreseeable future. It is anticipated that this population growth will result in increased levels of vehicular traffic, with a corresponding increase in traffic accidents, a decrease in the roadway's traffic handling capability, and a decline in the functionality of the roadway as part of an area-wide transportation system. The purpose of the project is to increase capacity and improve mobility in the roadway corridor while enhancing safety and system interconnectivity, in compliance with the adopted CAMPO Mobility 2030 Plan.

The EIS will evaluate potential impacts from construction and operation of the project, including, but not limited to, the following: impacts or potential displacements to residents and businesses; detours; air and noise impacts from construction equipment and operation of the project; water quality impacts from the construction area and from roadway storm water runoff; impacts to waters of the United States; impacts to historic and archeological resources; impacts to floodplains; impacts to socio-economic resources (including environmental justice and limited English proficiency populations); indirect impacts; cumulative impacts; land use; vegetation; wildlife; and aesthetic and visual resources. To date the department has not identified any known or potential significant impacts on the human environment.

The department will consider several alternatives intended to satisfy the identified need and purpose. The alternatives will include the no-build alternative, Transportation System Management/Transportation Demand Management, mass transit, and roadway build alternatives. The roadway build alternatives may range from a six-lane arterial to a six-lane controlled access tolled freeway with non-tolled frontage roads. The roadway build alternatives may include: 1) an alignment that generally follows the current alignment of US 290; 2) an alignment that generally follows Old Texas Highway 20 through the City of Manor; 3) an alignment that loops north of the Shadow Glen subdivision and ties back into US 290 just east of FM 973; and 4) an alignment that loops south of the City of Manor and ties back into US 290 just east of FM 973.

The project may require the following approvals by the federal government: United States Army Corps of Engineers (USACE) Section 404; Section 401 Water Quality Certification; and National Pollutant Discharge Elimination System (NPDES). The actual approvals required may change after the department completes field surveys and selects the alignment for the project.

A scoping meeting is an opportunity for participating agencies, cooperating agencies, and the public to be involved in defining the need and purpose for the proposed project, to assist in determining the range of alternatives for consideration in the draft EIS, and to comment on methodologies to evaluate alternatives. The department will publish notice that scoping meetings will be held. The notice will be published in newspapers of general circulation in the project area at least 30 days prior to the meetings, and again approximately 10 days prior to the meetings.

The department will complete the procedures for public participation and coordination with other agencies as described in one or both the National Environmental Policy Act and state law. In addition to any scoping meetings, the department will hold a series of meetings to solicit public comment during the environmental review process. They will be held during appropriate phases of the project development process. Public notices will be given stating the date, time, and location of the meeting or hearing and will be published in English as well as Spanish. Provision will be made for those with special communication needs, including translation if requested. The department will also send correspondence to federal, state, and local agencies, and to organizations and individuals who have previously expressed or are known to have an interest in the project, which will describe the proposed project and solicit comments. The department invites comments and suggestions from all interested parties to ensure that the full range of issues related to the proposed project are identified and addressed. Comments or questions should be directed to the department at the address set forth below.

The department currently anticipates that the draft EIS will be completed in Summer/Fall of 2009, and the EIS will be approved in Summer/Fall of 2010.

Agency Contact: Comments or questions concerning this proposed action and the EIS should be sent to Wesley M. Burford, P.E., Director, Transportation Planning and Development, Texas Department of Transportation, Austin District, P.O. Drawer 15426, Austin, Texas 78761; Telephone (512) 832-7000.

TRD-200703616
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: August 15, 2007

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).